No. 3721

# United States (D

# Circuit Court of Appeals

## For the Ninth Circuit.

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W. R. GRACE & COMPANY, a Corporation,
Appellant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and ROBERT NETTLEFOLD,
Appellees.

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# Apostles on Appeal.

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**Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.**

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FILED
AUG 17 1921
F. D. MONCKTON,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

No. 16,058.

W. R. GRACE & CO.,

Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., et al.,

Respondents.

**Praecipe for Apostles on Appeal.**

To the Clerk of Said Court:

Sir: Please prepare apostles on appeal to contain the following papers:

Caption.

Statement required by Admiralty Rule 4, Circuit Court of Appeals.

Libel.

Claim of Ford Motor Co. of Canada, to Autos and Parts.

Claim of Ford Motor Co. of Canada, to property seized *in rem.*

Return of Southern Pacific Co.

Answer.

Exception to Answer and Interrogatories.

Opinion of Court overruling exceptions.

Testimony.

Exhibits.

Opinion ordering libel dismissed.

Final Decree.

Notice of appeal. [1*]
Assignment of errors.
Praecipe.

ANDROS & HENGSTLER,
Proctors for Libelant.

[Endorsed]: Filed Jun. 1, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [2]

---

In the Southern Division of the District Court of the United States, Northern District of California, First Division.

No. 16,058.

W. R. GRACE & COMPANY, a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,
Respondents.

**Statement of Clerk U. S. District Court.**

PARTIES.

Libelant: W. R. GRACE & COMPANY, a Corporation.

Respondents: FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES.

Claimant: FORD MOTOR COMPANY OF CANADA, LTD., a Corporation. [3]

PROCTORS.

For Libelant: Messrs. ANDROS & HENGSTLER, and LOUIS T. HENGSTLER, Esq., and F. W. DORR, Esq.

For Respondents and Claimant: Messrs. McCUTCHEN, WILLARD, MANNON & GREENE, W. F. WILLIAMSON, Esq., and Mesrs. PILLSBURY, MADISON & SUTRO.

PROCEEDINGS.

1916.

June 27. Filed libel *in rem* and *in personam,* for breach of contract ($319,-500.00).

Ordered citation on order for foreign attachment issue.

Issued citation on order for foreign attachment, which was returned and filed July 11, 1916, as a part of the return of Southern Pacific Company. The return of the United States marshal endorsed thereon is copied elsewhere in the apostles.

Issued citation, citing the respondent, Ford Motor Company of Canada, Ltd., to appear and answer the libel herein on July 11, 1916, which was afterwards to wit, on July 11th, 1916 returned, with the following return of the U. S. marshal endorsed thereon:

"I hereby return that I am unable to find the Respondent Ford Motor Company of Canada (Ltd.), a corporation, in my District, this 11th day of July, A. D. 1916.

J. B. HOLOHAN,
U. S. Marshal.
By Geo. H. Burnham,
Chief Deputy Marshal." [4]

Issued Monition for the attachment of Certain Automobiles and Part in Packages, which was returned on July 11th, 1916, with the following return of the United States marshal endorsed thereon:

"In obedience to the within Monition, I attached the property herein described, on the 27th day of June, 1916, and have given due notice to all persons claiming the same that this Court will, on the 11th day of June, 1916 (if that day be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to trial and condemnation thereof, should no claim be interposed for the same. I further return that I posted a notice of seizure on the herein named

property and placed a keeper in charge thereof.

J. B. HOLOHAN,
United States Marshal.
By Laurence J. Conlon,
Office Deputy.

San Francisco, Cal., July 11, 1916."

July 5. Filed claim of Ford Motor Company of Canada, Ltd., to 1100 packages of automobiles seized under process issued *in rem.*

Filed claim of Ford Motor Company of Canada, Ltd., to property seized under authority of citation on order for foreign attachment.

Filed stipulation that property claimed by respondent may be released upon the filing of an admiralty stipulation in the sum of $400,000.00.

Filed admiralty stipulation in the sum of $400,000.00 for the release of property seized, with The Aetna Accident & Liability Co. and United States Fidelity & Guaranty Co. as sureties.

Filed appearance of respondent and claimant. [5]

July 11. Filed return of Southern Pacific Company to citation on order for foreign attachment, with original citation and return of U. S. Marshal attached thereto.

Proclamation was this day made and claimant given ten days to answer.

August 30. Ordered admiralty stipulation for the release of property be reduced to the sum of $200,000.00.

October 17. Filed stipulation that the amount of admiralty stipulation for the release of property may be reduced to $200,000.00.

Filed admiralty stipulation for release, in the sum of $200,000.00, with The Aetna Accident & Liability Co., and United States Fidelity & Guaranty Co. as sureties.

31. Filed answer of respondent and claimant with interrogatories attached.

December 12. Filed exceptions to answer and interrogatories.

1918.

March 2. Hearing was this day had on the exceptions to answer and interrogatories, before the Hon. M. T. Dooling, and was ordered submitted.

June 5. Filed stipulation that amount of admiralty stipulation for release may be reduced to $160,000.00.

Filed admiralty stipulation for release in the sum of $160,000.00 with The Aetna Casualty & Surety Co. and United States Fidelity &

29. Filed opinion (Hon. M. T. Dooling, Judge), in which it was ordered that the exceptions to answer and interrogatories be overruled.

July 31. Filed order cancelling bond for release executed October 17, 1916. [6]

August 28. Filed answers to interrogatories propounded to libelant.

1919.

May 15. Filed bond for release of property, in the sum of $160,000.00 with British American Bank as surety.

Filed stipulation and order that the above bond be substituted for the bond filed on June 5, 1918, and that said last named bond be cancelled.

July 7. Filed stipulation that order and stipulation filed May 15th, 1919, pertaining to substitution of bond for release, be set aside and annulled, and that the bond executed and filed June 5th, 1918, be continued and remain in full force and effect.

1920.

October 27. Filed notice, directed to respondent, to produce certain correspondence.

November 15. Filed two notices, directed to libelants, to produce certain documents, etc.

This cause came on this day for trial; the Honorable M. T. Dooling, Judge, presiding.

16. Filed notice, directed to libelant, to produce certain documents.

Trial was this day resumed.

17. Trial was this day resumed. Case continued to November 22, 1920, for argument.

22. The cause was argued and submitted.

27. Filed four volumes of testimony.

1921.

March 1. Filed opinion in which it was ordered that the libel be dismissed. [7]

May 4. Filed final decree.

26. Filed notice of appeal.

Filed assignment of errors.

It was this day ordered that the supersedeas bond on appeal be fixed in the sum of $20,000.00.

27. Filed supersedeas bond in the sum of $20,000.00 with Maryland Casualty Co. as surety.

June 2. Filed cost bond on appeal in the sum of $250.00 with Maryland Casualty Co. as surety. [8]

In the District Court of the United States for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

W. R. GRACE & CO., a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,
Respondents.

**Libel In Rem and In Personam.**

To the Honorable MAURICE T. DOOLING, Judge of Said Court:

The libel of W. R. Grace & Co., a corporation, against the Ford Motor Company of Canada, Ltd., a corporation, and against Certain Automobiles and Parts, respectfully shows as follows:

I.

That W. R. Grace & Co. is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and is doing business as an exporter and carrier of merchandise at the port of San Francisco and various other ports of the world.

II.

That Ford Motor Company of Canada, Ltd., is a corporation organized and existing under and by virtue of the laws of Ontario, Dominion of Canada,

and is doing business as a manufacturer and shipper of automobiles.

III.

That on or about the 25th day of February, 1916, libelant W. R. Grace & Co. and respondent Ford Motor Company of Canada, Ltd., made and entered into a written contract wherein and whereby said [9] respondent agreed to deliver to libelant alongside the American steamship "Cacique" at San Francisco as fast as said vessel could load, otherwise shipper to pay demurrage at the rate of $3,000 per day, for shipment per said steamship to Australia, libelant to advise respondent more definitely as to exact loading date when said vessel should be closer to San Francisco, 6,200 tons (40 cubic feet each) automobiles and parts in packages, total shipment to weigh approximately 1550 tons (2240 pounds each) measuring about four to one; that respondent Ford Motor Company of Canada, Ltd., agreed to pay to libelant as freight therefor at the rate of $47.50 per 40 cubic feet measurement, said freight to be paid in advance; that respondent Ford Motor Company of Canada, Ltd., so agreed in consideration of the agreement of libelant to accept and ship by said vessel at said rate of freight from San Francisco to Australia, said 6200 tons (40 cubic feet each) automobiles and parts in packages, total shipment to weigh approximately 1550 tons (2240 pounds each) measuring about four to one.

IV.

That thereafter and on or about the 5th day of

June, 1916, libelant advised respondent Ford Motor Company of Canada, Ltd., that, as to the loading date aforesaid, said steamship "Cacique" would be ready for loading said 6200 tons of automobiles and parts in packages as per said contract of February 25, 1916, on the 27th day of June, 1916.

V.

That thereafter and on or about the 23d and 24th days of June, 1916, about 1100 packages consigned to order of respondent of automobiles and parts in packages, of wholly different description and bulk than required by and specified in said contract of February 25, 1916, were deposited by respondent Ford Motor Company of Canada, Ltd., on Pier 26, in the city and county of San Francisco, the wharf of libelant alongside of which said steamship "Cacique" was to dock, and that thereafter, on the 27th day of June, 1916, said [10] steamship "Cacique" arrived alongside of said dock and was in readiness to load said cargo described and specified in said contract of February 25, 1916.

VI.

That on the 23d and 26th days of June, 1916, said respondent Ford Motor Company of Canada, Ltd., in writing expressly refused to perform said contract of February 25, 1916, and advised and informed libelant that said respondent Ford Motor Company of Canada, Ltd., had forwarded 4075 odd tons of cargo for said steamship "Cacique" at an ocean freight rate of $47.50; that said amount of 4075 odd tons was the entire cargo that said respondent Ford Motor Company of Canada, Ltd., would forward for

said steamship, and that if libelant should attempt to hold said 4075 tons for freight for 6200 tons at said rate, said respondent Ford Motor Company of Canada, Ltd., would decline to load any of said cargo whatsoever.

VII.

That thereafter and on or about the 24th day of June, 1916, about 1100 packages consigned to order of respondent of automobiles and parts in packages, of wholly different description and bulk than required by and specified in said contract of February 25, 1916, having been deposited on said pier 26, libelant's wharf alongside of which said steamship "Cacique" was to dock, as aforesaid, and other automobiles and parts in packages, also of wholly different description and bulk than required by and specified in said contract of February 25, 1916, then and there in the possession or custody of the Southern Pacific Railway Company in the city and county of San Francisco, being in course of delivery on said wharf for shipment on said steamship, said respondent Ford Motor Company of Canada, Ltd., instructed said railway company not to make any further delivery thereof on said wharf of libelant, and instructed said railway company [11] to remove from said wharf such automobiles and parts in packages as had been theretofore delivered on the same, and wholly failed, neglected and refused to deliver any automobiles and parts in packages or otherwise in accordance with the terms and provisions of said contract of February 25, 1916, and wholly failed, neglected and refused to perform the

obligations of said contract by said respondent Ford Motor Company of Canada, Ltd., to be performed, and has ever since continued, and now continues to so fail, neglect and refuse.

VIII.

That said 1100 packages consigned to order of respondent of automobiles and parts in packages are now on the wharf of libelant, alongside of said steamship "Cacique," and ready for shipment thereon, and are within the Northern District of California and within the admiralty and maritime jurisdiction of this Honorable Court.

IX.

That libelant has duly performed all the terms and conditions and obligations of said contract on the part of libelant to be performed, except in so far as libelant has been prevented from so doing by the acts of said respondent Ford Motor Company of Canada, Ltd.

X.

That by reason of the premises, and on account of the failure, neglect and refusal of said respondent Ford Motor Company of Canada, Ltd., to deliver said 6200 tons of automobiles and parts in packages, or any part thereof, in accordance with the terms and provisions of said contract of February 25, 1916, and its failure, neglect and refusal to perform the obligations of said contract upon its part to be performed, libelant has suffered damages in the sum of $319,500.00, according to libelant's best present information and belief; that libelant is unable at the present moment to determine ac-

curately the amount of damage suffered by libelant, but verily [12] believes that the same will not be less than the above sum, and libelant prays that it be permitted hereafter to amend its libel by increasing the said amount, and to make the same accord with the actual damages sustained by libelant through said respondent's Ford Motor Company of Canada, Ltd., breach of said contract.

XI.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

WHEREFORE, libelant prays that process in due form of law according to the usage and custom of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against said automobiles and parts aforesaid, now upon Pier 26, libelant's wharf in the city and county of San Francisco, State of California, and that all persons claiming any interest therein may be cited to appear and answer on oath all and singular the matters aforesaid; and that said respondent Ford Motor Company of Canada, Ltd., a corporation, may be personally cited to appear and answer on oath all of the matters aforesaid; and that this Honorable Court will be pleased to decree the payment by respondents of the libelant's damages aforesaid, together with interest and costs, and that said automobiles and parts now on libelant's wharf in the city and county of San Francisco, State of California, may be condemned and sold to pay the same; and that if said respondent Ford Motor Company

of Canada, Ltd., cannot be found, then that the goods and chattels of such respondent in this District may be attached, and if goods and chattels belonging to said respondent cannot be found, then that the credits and effects of said respondent may be attached in the hands of any persons in whom the same may be found, and that such garnishee or garnishees may be cited to appear and answer on oath as to the credits and effects belonging to said respondent in their hands; and that libelant may have such other and further relief in the premises as in law and justice it may be entitled to receive. [13]

ANDROS & HENGSTLER,
GOLDEN W. BELL,
Proctors for Libelant.

State of California,
City and County of San Francisco,—ss.

Gale H. Carter, being first duly sworn, deposes and says: That he is an officer of the libelant corporation, to wit, Sub-Manager thereof, and as such is authorized to make this verification in its behalf; that he has read the foregoing libel and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters he believes it to be true.

GALE H. CARTER.

Subscribed and sworn to before me this 27 day of June, A. D. 1916.

[Seal] C. W. CALBREATH,
Deputy Clerk U. S. District Court, Northern District of California.

Let process issue as prayed.
June 27th, 1916.

M. T. DOOLING,
Judge of Said Court.

[Endorsed]: Filed Jun. 27, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [14]

---

In the District Court of the United States for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

W. R. GRACE & CO., a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,
Respondents.

**Claim of Ford Motor Company of Canada, Ltd. (to Property Seized in Rem).**

To the Honorable M. T. DOOLING, Judge of the United States District Court for the Northern District of California:

The claim of Ford Motor Company of Canada, Ltd., a corporation, to eleven hundred (1100) pack-

ages of automobile parts heretofore seized by the United States Marshal for the Northern District of California, under process issuing *in rem* against said property, which said cargo is now in the custody of said marshal at the suit of W. R. Grace & Co., a corporation, under said process, alleges:

That it is the true and *bona fide* owner of the said property; that no other person is the owner thereof.

WHEREFORE, this claimant prays that this Honorable Court will be pleased to decree a restitution of the same to it and otherwise right and justice to administer in the premises. [15]

FORD MOTOR COMPANY OF CANADA, LTD.,

By L. C. DAVIS,
Traffic Mgr.

Northern District of California,—ss.

Subscribed and sworn to before me this 5th day of July, 1916.

[Seal] C. W. CALBREATH,
Deputy Clerk, U. S. District Court, Northern District of California.

W. F. WILLIAMSON,
McCUTCHEN, OLNEY & WILLARD,
PILLSBURY, MADISON & SUTRO,
Proctors for Claimant.

[Endorsed]: Filed Jul. 5, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [16]

In the District Court of the United States for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

W. R. GRACE & CO., a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,
Respondents.

**Claim or Ford Motor Company of Canada, Ltd., (to Property Levied upon by Writ of Foreign Attachment).**

To the Honorable M. T. DOOLING, Judge of the United States District Court for the Northern District of California:

The claim of Ford Motor Company of Canada, Ltd., a corporation, to all of the property except that owned by and heretofore claimed by Robert Nettlefold, and except eleven hundred (1100) packages of automobile parts seized under process *in rem* issuing out of the above-entitled court in said cause, which last-mentioned cargo has been claimed by this claimant and which said balance of said cargo is now in the custody of said marshal at the suit of W. R. Grace & Co., a corporation, under process of foreign corporation, alleges:

That it is the true and *bona fide* owner of the

said property; that no other person is the owner thereof.

WHEREFORE, this claimant prays that this Honorable Court will be pleased to decree a restitution of the same to it and otherwise right and justice to administer in the premises. [17]

FORD MOTOR COMPANY OF CANADA, LTD.,

By L. C. DAVIS,
Traffic Mgr.

Northern District of California,—ss.

Subscribed and sworn to before me this 5th day of July, 1916.

[Seal] C. W. CALBREATH,
Deputy Clerk, U. S. District Court, Northern District of California.

W. F. WILLIAMSON,
McCUTCHEN, OLNEY & WILLARD,
PILLSBURY, MADISON & SUTRO,
Proctors for Claimant.

[Endorsed]: Filed Jul. 5, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [18]

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**United States Marshal's Return (to Citation on Order for Foreign Attachment).**

I CERTIFY that after due and diligent search and inquiry I am unable to find the within named respondent within the Northern District of California, and that in obedience to and under and by virtue of the within writ, I attached the goods and

chattels, which are described as follows and which were found within said Northern District of California, to wit: One hundred and eighty (180) cars of automobiles shipped by the Ford Motor Company of Canada, Limited, from Walkerville, Ontario, and consigned to the order of Ford Motor Company of Canada, Limited, or to W. R. Grace & Company at San Francisco, which cars moved over the lines of the Southern Pacific Company and connecting carriers to San Francisco, and all of said automobiles and parts contained in said shipment being at San Francisco and in the possession of said Southern Pacific Company with the exception of thirty (30) cars of automobiles which were delivered to W. R. Grace & Company at Pier 26, San Francisco; all of said automobiles and parts in packages being claimed by the Ford Motor Company of Canada, Limited, a corporation, and released by me upon said respondent furnishing a bond in the sum of four hundred thousand dollars, as appears from the records and files in the office of the clerk of said court.

J. B. HOLOHAN,
United States Marshal.
By Lawrence J. Conlon,
Office Deputy.

San Francisco, California, July 11, 1916. [19]

In the District Court of the United States for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

W. R. GRACE & CO., a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,
Respondents.

**Citation and Order for Foreign Attachment.**

The President of the United States of America, to the Marshal of the Northern District of California, GREETING:

WHEREAS, a libel was filed in the District Court of the United States, in and for the Northern District of California, on the 27th day of June, in the year of our Lord one thousand nine hundred sixteen, by W. R. Grace & Co., a corporation, libelant, against the above-named respondent, Ford Motor Company of Canada, Ltd., in a certain cause of contract civil and maritime, for recovery of $319,500.00 damages alleged to have resulted to said libelant through the failure of said respondent to perform its duties and obligations under and by virtue of the terms of a certain agreement whereby said respondent agreed to ship certain merchandise from San Francisco to Australia on libelant's steamship "Cacique," to the damage of libelant in said sum of $319,500.00,

and praying that a citation may issue against said respondent pursuant to the rules and practice of this Court, and that the goods, chattels and credits of respondent in this District may be attached [20] to compel the respondent's attendance in case it cannot be found;

NOW, THEREFORE, we do hereby directly charge and empower and command you, the said marshal, that you warn said respondent Ford Motor Company of Canada, Ltd., if it shall be found in your District, to be before said District Court of the United States, at the Postoffice Building in the city and county of San Francisco, State of California, on the 11th day of July, A. D. 1916, at ten (10) o'clock A. M., then and there to answer the said libel and make its allegations in that behalf; and if said respondent cannot be found in your District, we command you that you attach its goods and chattels in your District to the amount sued for; and if sufficient goods and chattels cannot be found, then that the credits and effects of said respondent in the jurisdiction of this court may be attached, and that you cite the persons in whose hands or possession such credits and effects may be to appear and answer on oath as to such credits and effects in their hands belonging to said respondent; and have you then and there this writ with your return thereon.

WITNESS the Honorable MAURICE T. DOOLING, Judge of said Court, this 27th day of June,

in the year of our Lord one thousand nine hundred sixteen.

[Seal] W. B. MALING,
Clerk.
C. W. Calbreath,
Deputy Clerk U. S. District Court, Northern District of California.

ANDROS & HENGSTLER,
GOLDEN W. BELL,
Proctors for Libelant. [21]

---

In the District Court of the United States for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

W. R. GRACE & CO., a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,
Respondents.

**Return of Southern Pacific Company to Citation and Order for Foreign Attachment and to Garnishment.**

Now comes Southern Pacific Company, a corporation, organized and existing under and by virtue of laws of the State of Kentucky, and makes the following return to the citation and order for foreign attachment and to the garnishment heretofore

served upon it in the above-entitled proceedings, to wit:

Said respondent, Ford Motor Company of Canada, Ltd., caused to be shipped from Walkerville, Ontario, 180 cars of automobiles consigned to W. R. Grace & Co., at San Francisco, which said cars moved over the lines of Southern Pacific Company, and connecting carriers, to San Francisco, and all of the automobiles and parts contained in said shipments are now at San Francisco in the possession of said Southern Pacific Company, with the exception of 30 cars of automobiles which were delivered to W. R. Grace & Co., at Pier 26, San Francisco, and are now in the custody of the United States Marshal. A statement showing the [22] number and initials of the cars contained in said shipments, the contents, point of origin, waybill reference, point of destination, the party to whom notice of such shipments was to be given (said shipments moving under order bills of lading), and the steamer via which said shipments were to be transported from San Francisco, was filed with the marshal on June 28, 1916, and the same is hereby specifically referred to and made a part of this return.

Said Southern Pacific Company has in its possession no other property belonging to said Ford Motor Company of Canada, Ltd., nor is it indebted

to said Ford Motor Company of Canada, Ltd., in any sum or sums whatsoever.

SOUTHERN PACIFIC COMPANY,
By T. O. EDWARDS,
Assistant Secretary.

C. W. DURBROW,
FRANK B. AUSTIN,
Proctors for Southern Pacific Company.
[23]

State of California,
City and County of San Francisco,—ss.

T. O. Edwards, being first duly sworn, deposes and says:

That he is an officer, to wit, Assistant Secretary of Southern Pacific Company, a corporation, named in the foregoing return and that he is duly qualified and authorized to make this verification for and on behalf of said corporation; that he has read the foregoing return to the citation and order for foreign attachment and garnishment and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

T. O. EDWARDS.

Subscribed and sworn to before me this 6th day of July, 1916.

[Seal] HUGH T. SIME,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jul. 11, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [24]

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In the District Court of the United States for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

W. R. GRACE & CO., a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,
Respondents.

FORD MOTOR COMPANY OF CANADA, LTD.,
Claimant.

**Answer.**

To the Honorable the Judges of the United States District Court, for the Northern District of California:

The answer of Ford Motor Company of Canada, Ltd., a corporation, claimant and respondent herein, to the libel of W. R. Grace & Co., a corporation, libelant herein, admits, denies and alleges as follows:

I.

Claimant and respondent admits the allegations of Article I of said libel.

II.

Claimant and respondent admits the allegations

III.

Answering unto the allegations of Article III of said libel, claimant and respondent denies that said allegations correctly set forth the terms and conditions of any contract between libelant and claimant and respondent entered into on or about the 25th day of February, 1916, or at any other time; and in that behalf alleges that libelant and claimant and respondent, on and about the 25th day of February, 1916, entered into a contract for the shipment per [25] libelant's American S. S. "Cacique" of a quantity of automobiles and parts from San Francisco to Wellington, New Zealand and/or Sydney, Australia, which contract in its complete terms and conditions was as set forth in that certain copy thereof attached hereto, marked Exhibit "A," and hereby made a part of this answer with the same force and effect as though pleaded at length herein.

IV.

Claimant and respondent denies the allegations of Article IV of said libel, but in that behalf alleges that prior to the 1st day of June, 1916, and at divers times, libelant gave claimant and respondent notice of earlier loading dates in the month of June, and thereafter, and on or about the 6th day of June, 1916, gave unto Ford Motor Company of San Francisco, California, that certain notice set forth in a copy thereof attached hereto, marked Exhibit "B," and hereby made a part of this answer with the same force and effect as though pleaded at length herein.

V.

Answering unto the allegations of Article V of said libel, claimant and respondent admits that thereafter and on or about the 23d and 24th days of June, 1916, approximately 1115 packages, weighing about 1500 tons, consigned to the order of claimant and respondent, of automobiles and parts in packages, were deposited by claimant and respondent, Ford Motor Company of Canada, Ltd., on Pier No. 26 in the city and county of San Francisco, the wharf of libelant, alongside of which said steamship "Cacique" was to dock, and that thereafter, and on the 27th day of June, 1916, said steamship "Cacique" arrived alongside of said dock. Claimant and respondent denies, however, that said 1115 packages were of wholly different description and bulk than required by and specified in the aforesaid contract of February 25th, 1916, and denies that the said steamship "Cacique" was on the 27th day of June, 1916, in readiness to load said cargo described and specified in said contract of [26] February 25th, 1916; and in that behalf, claimant and respondent alleges that while said steamship "Cacique" berthed at said wharf during the forenoon of said 27th day of June, 1916, she was not in readiness to load said cargo as she was then fully loaded with inward cargo from Oriental ports, discharge of which was not completed until the 8th day of July, 1916, and she was also unfumigated and in an unseaworthy state, and was not, in fact, thereafter in readiness to load until the 12th day of July, 1916, following a drydocking at Hunter's Point Dry-

dock and the partial completing of repairs to hull and machinery necessary to place her in a fit and seaworthy condition for the prosecution of her outward voyage, all as hereinafter more specifically alleged.

VI.

Claimant and respondent denies that on the 23d and 26th days of June, 1916, or at any other time, respondent, Ford Motor Company of Canada, Ltd., in writing, or otherwise, expressly refused to perform said contract of February 25th, 1916, or that, otherwise than as hereinafter expressly stated, it advised or informed libelant that respondent, Ford Motor Company of Canada, Ltd., had forwarded 4075 odd tons of cargo for said steamship "Cacique" at an ocean freight of $47.50 per ton, or that said amount of 4075 odd tons was the entire cargo that said respondent, Ford Motor Company of Canada, Ltd., would forward for said steamship, or that if libelant should attempt to hold said 4075 odd tons for freight for 6200 tons at said rate, said respondent, Ford Motor Company of Canada, Ltd., would decline to load any of said cargo whatsoever; and in that behalf claimant and respondent alleges that on or about June 1st, 1916, it notified libelant, by letter, that in addition to the 4075 tons, it had effected an arrangement with the Union Steamship Company to transfer to libelant 1500 tons of the tonnage then on the coast originally contemplated to go forward [27] by Union Steamships, and that it understood that libelant had let 524 tons additional, making 6099 tons all told out of the 6200

tons allotted to claimant and respondent, and that said letter and the above arrangement was without prejudice to claimant and respondent's rights to contend that any engagement purporting to have been entered into on its behalf had not been carried out by libelant, in that such an engagement called for June loading, which in the parlance must necessarily mean June shipping, whereas, claimant and respondent understood that the steamer "Cacique" would not leave San Francisco on its outward voyage until about the 10th day of July, 1916, although it had previously been advised that the said S. S. "Cacique" would leave on June 24th, 1916, and again on June 14th, 1916, and that claimant and respondent's plans were all laid with this in view and that the sailing date of July 10th had materially disturbed them, and it, therefore, wanted it definitely understood that, if by reason of the above, or other circumstances, claimant and respondent's plans for supplying 6200 tons for said vessel did not carry through, it did not consider its obligation binding, a copy of which letter and notice is hereby attached, marked Exhibit "C," and hereby made a part of this answer with the same force and effect as though pleaded at length herein; and claimant and respondent further in that behalf alleges that on the 14th day of June, 1916, it addressed another letter and notice to libelant, wherein it gave notice, *inter alia,* that it had forwarded 4075 tons of cargo for libelant's steamship "Cacique" at an ocean freight of $47.50, and that this was the entire cargo that it would forward for this vessel, and was the

cargo that libelant had been informed from time to time would be forwarded for said vessel, and that if libelant wished to accept said cargo, it was at liberty [28] to do so on those terms, but if libelant took the attitude that there was a contract binding upon claimant and respondent for 6200 tons space, and attempted to hold said 4075 tons of cargo for freight for 6200 tons at the above rate, claimant and respondent would decline to load any of the cargo whatever, and that it was not necessary for claimant and respondent to go into the details for the reasons moving it, and that libelant must have misunderstood claimant and respondent's previous letter, to wit, that of June 1st, 1916, as said letter was designed to show in an argumentative way that if there was a contract for 6200 tons binding upon claimant and respondent, which never had been admitted, but had always been denied, such contract was inoperative by reason of the fact that libelant's steamer "Cacique" had already taken out a clearance for July 5th, instead of loading and clearing in June, and that said shipment of 4075 tons quantity, on the basis outlined above, would be ready and alongside libelant's steamer on June 27th, as indicated by libelant, a copy of which letter and notice is hereby attached, marked Exhibit "D," and hereby made a part of this answer with the same force and effect as though pleaded at length herein.

VII.

Answering unto the allegations in Article VII of said libel, claimant and respondent denies that thereafter, and on or about the 24th day of June,

1916, or after 1100 packages consigned to the order of claimant and respondent of automobiles and parts in packages had been deposited on said Pier No. 26, libelant's wharf, alongside of which said S. S. "Cacique" was to dock, or after other automobiles and parts in packages, or while said automobiles and parts in packages were then and there in the possession and custody of the Southern Pacific Railroad Company, in the city and county of San Francisco, or in course of delivery on said wharf for shipment [29] on said steamship, or at any other time, said claimant and respondent, Ford Motor Company of Canada, Ltd., instructed said Railway Company not to make any further delivery of said automobiles and parts in packages on said wharf of libelant, or instructed said Railway Company to remove from said wharf such automobiles and parts in packages as had been theretofore delivered on the same; and denies that the said 1115 packages so deposited on said Pier No. 26, or other, or any automobiles and parts in packages then and there in the possession or custody of the Southern Pacific Company, or in course of delivery on said wharf for shipment on said S. S. "Cacique" were wholly or at all of different description or bulk than required by and specified in the said contract of February 25, 1916; and in that behalf claimant and respondent alleges that the said Southern Pacific Company, on the 23d and 24th days of June, 1916, delivered into the custody of libelant, on Pier No. 26 approximately 1115 packages of automobiles and parts, in packages, measuring approximately 1500 tons, for

shipment on said steamship "Cacique"; that said packages were receipted for and delivery thereof acknowledged and acted upon by libelant by its filing its libel *in rem* herein against said packages and by causing the same to be attached by process issuing out of this court in this action; that at the time of said delivery to libelant, said steamship "Cacique" had not arrived in the port of San Francisco on her inward voyage from Oriental ports, and at said time a strike of stevedores was prevailing along the wharves in the harbor of San Francisco, and particularly against libelant herein; that on the 24th day of June, 1916, claimant and respondent, being advised that the delivery of any more of said cargo on said pier would endanger the safety of said cargo at the hands of strikers, and that the surrender by the Southern Pacific Company of possession of said cargo under the circumstances might [30] entail great loss to claimant and respondent in the event that said automobiles and parts were destroyed by fire after they had left the possession of said railroad company on said wharf and prior to being loaded on the said steamer "Cacique" when in readiness and in fit condition to load the same, and having no definite assurances from libelant as to the date when said cargo would be loaded upon the said steamship "Cacique," then instructed said Southern Pacific Company not to make further deliveries to libelant until notified so to do by claimant and respondent, and that it was necessary that said Railway Company should retake into its possession the portions of said cargo

already delivered, which, in fact, was not done, or attempted to be done, by said Company; that said cargo remained in possession of libelant until taken into custody by the United States marshal, pursuant to process issuing in this cause.

Claimant and respondent denies that it wholly, or at all, failed or neglected or refused to deliver any automobiles and parts in packages, or otherwise, in accordance with the terms and provisions of said contract of February 25th, 1916, and denies that it wholly or at all failed, or neglected, or refused to perform the obligations of said contract by it to be performed, and denies that it has ever since, or at all, continued, or that it now continues, so to fail, or neglect or refuse.

VIII.

Answering unto the allegations in Article VIII of said libel, claimant and respondent admits that said 1100 packages, consigned to order of respondent, of automobiles and parts in packages, were, at the time of the filing of said libel, on the wharf of libelant, alongside said steamship "Cacique," and in the possession of libelant, and were within the Northern District of California, and within the admiralty and maritime jurisdiction of this [31] Honorable Court, as they were then in the possession of libelant in part performance by claimant and respondent of said agreement of February 25th, 1916; and admits that said packages were ready for shipment on said steamship "Cacique" if and when the same should be loaded by libelant on said

Steamer in accordance with said agreement of February 25th, 1916.

IX.

Answering unto the allegations in Article IX of said libel, claimant and respondent denies that libelant has performed all or any of the terms, conditions and obligations of said contract on its part to be performed, and denies that libelant has been prevented from so doing by the acts, or any acts of claimant and respondent, Ford Motor Company of Canada, Ltd.

X.

Claimant and respondent denies each and every of the allegations in Article X of said libel.

XI.

Answering unto the allegations in Article XI of said libel, claimant and respondent denies that all and singular the premises are true, but admits that they are within the admiralty and maritime jurisdiction of this Honorable Court.

AND, further answering unto the allegations of said libel, claimant and respondent alleges:

I.

That claimant and respondent, having sold a large quantity of automobiles for delivery in New Zealand and Australia, actual shipment of which by water was required to be made during the month of June, and having been advised by libelant that libelant's steamship "Cacique" would sail from the port of San Francisco early in the month of June, and that said automobiles could be carried on said steamer, entered into that certain contract [32]

with libelant, a copy of which is hereto attached, marked Exhibit "A," and hereby made a part of this Answer with the same force and effect as though pleaded at length herein, wherein and whereby claimant and respondent agreed to ship, and libelant agreed to load and transport, on board said S. S. "Cacique," in the month of June, 1916, 6200 tons (40 cubic feet each) of automobiles and parts in packages, at a freight rate of $47.50 per ton, 40 cubic feet measurement, freight prepaid, from San Francisco to Wellington, New Zealand, and/or Sydney, Australia.

II.

That subsequent to the execution of said agreement, libelant named to claimant and respondent June 14th and then June 24th, 1916, as the sailing dates of said S. S. "Cacique" from San Francisco, and subsequent thereto and before June 1st, 1916, advised claimant and respondent that said sailing date had been postponed beyond the month of June, as required by said contract, until the 10th day of July, 1916, and thereupon, on June 1st, 1916, claimant and respondent wrote libelant that certain letter, a copy of which is hereby attached, marked Exhibit "C," and hereby made a part of this answer with the same force and effect as though pleaded at length herein, wherein and whereby it notified libelant of the quantity of tonnage which it would have available for shipment under said contract, and advising it that such arrangement was without prejudice to claimant and respondent's rights to contend that any engagement purporting

to have been entered into on its behalf had not been carried out by libelant, in that such engagement called for June loading, which in the parlance must necessarily have meant June shipping, whereas it was then understood that said S. S. "Cacique" would not leave the port of San Francisco until about the 10th of July, 1916, and advising libelant that claimant and respondent's plans were all laid with the view to a June 24th sailing, and that the sailing date [33] of July 10th had materially disturbed them, and definitely advising libelant that if by reason of the above or other circumstances claimant and respondent's plans for shipping 6200 tons on said vessel did not carry through, it did not consider its obligation binding.

That in response to said letter, libelant wrote claimant and respondent under date of June 6th, 1916, a copy of which letter is hereby attached, marked Exhibit "B" and hereby made a part of this answer with the same force and effect as though herein pleaded at length, noting surprise at claimant and respondent's remarks on the subject of June loading, and disagreeing with the contention which the latter reserved, but libelant failed and neglected to advise claimant and respondent in said letter that said steamer "Cacique" would load and sail during the month of June, as required by said agreement, and thereupon and thereafter, to wit, on the 14th day of June, 1916, claimant and respondent addressed a second letter to libelant, a copy of which is hereby attached, marked Exhibit "D," and hereby made a part of this answer with

the same force and effect as though pleaded at length herein, notifying libelant that any arrangements which the latter had made for 6200 tons were effected through the Ford Motor Company of San Francisco, which arrangements it did not and never had considered binding upon claimant and respondent, and which information it had previously given libelant, and then repeated, and further advised libelant that it had forwarded 4075 tons of cargo for its S. S. "Cacique" at an ocean freight rate of $47.50, and that this was the entire cargo that it had been informed would be forwarded for such vessel, and that if libelant wished to accept said cargo it was at liberty to do so on those terms, and that if it took the attitude that there was a contract binding upon claimant and [34] respondent for 6200 tons space and attempted to hold said 4075 tons of cargo for freight for 6200 tons at the above rate, it would decline to load any of the cargo whatever, and further advised libelant that it was not necessary for it, claimant and respondent, to go into details for the reasons moving it, and that libelant must have misunderstood its previous letter upon the subject, and that such letter was designed simply to show in an argumentative way that had there been a contract for 6200 tons binding upon claimant and respondent, which had never been admitted but had always been denied, such contract was inoperative by reason of the fact that its S. S. "Cacique" had already taken out a clearance for July 5th instead of loading and clearing in June, and that on the basis outlined above

its shipment of 4075 tons quantity would be ready and alongside said Steamer on June 27th, as indicated by libelant.

III.

That thereafter and on or about the 23d and 24th days of June, 1916, the Southern Pacific Company delivered into the custody of libelant approximately 1115 packages of automobiles and parts, part of the said shipment required by said contract of February 25th, 1916, at Pier No. 26, in the harbor of San Francisco, which pier libelant had designated as the pier at which its said S. S. "Cacique" would load; that at said time a strike of stevedores prevailed on the wharves in the harbor of San Francisco, and particularly against libelant, and thereupon claimant and respondent, fearing possible damage to its said packages of automobiles and parts from fire and violence, and not knowing whether said S. S. "Cacique," which had not then arrived in the port of San Francisco, would be able to load and sail with said cargo during the month of June, as required by said contract of February 25th, 1916, or June 24th, 1916, requested said Southern [35] Pacific Company to delay further deliveries until instructed by claimant and respondent to make them, and to retake into its possession the said packages previously delivered to libelant; that said Southern Pacific Company, however, did not retake or attempt to retake said 1115 packages, or any thereof, from the custody of libelant, and thereafter, and on the 26th day of June, 1916, libelant sent to claimant and respondent a telegram,

which was delivered to claimant and respondent in the forenoon of the 27th day of June, 1916, wherein libelant advised claimant and respondent that said libelant stood strictly upon said contract of February 25th, 1916, and insisted upon fulfillment thereof by claimant and respondent and further advised that libelant was ready to perform all its obligations under said contract and would take such quantities of automobiles as were delivered to it and would hold claimant and respondent responsible for damages and demurrage under said contract, and that by taking a smaller quantity of automobiles than the amount provided in said contract libelant did not accept such smaller quantity as a full satisfaction of said contract of February 25th, 1916, but as partial satisfaction thereof, and that by the acceptance of such smaller quantity libelant did not in any way release or waive any claim for damages or demurrage due under said contract; and thereafter, on said 27th day of June, 1916, and prior to the filing of the libel herein, the said S. S. "Cacique" having arrived at the port of San Francisco on that day and having berthed at said Pier No. 26, claimant and respondent withdrew its said order and request to the Southern Pacific Company.

IV.

That said S. S. "Cacique" arrived in the port of San Francisco on the morning of June 27th, 1916, and during the forenoon of said day docked at said Pier No. 26; that claimant and respondent [36]

be, that said S. S. "Cacique" was then loaded with a cargo of merchandise approximating 7900 tons transported from Oriental ports to said port of San Francisco; that upon said docking at said pier said steamship commenced the unloading of said cargo, and continued the same during days and nights, and finally completed discharge thereof late in the afternoon on the 8th day of July, 1916.

V.

That on the afternoon of said 27th day of June, 1916, and at or about the hour of four o'clock thereof, libelant filed its libel herein, and immediately had issued out of this court the process prayed for in said libel, and under and by virtue thereof immediately caused to be attached said 1115 packages of automobiles and parts which had been delivered to it by said Southern Pacific Company, as hereinbefore alleged, and also approximately 4500 tons of automobiles and parts belonging to claimant and respondent and in the possession of the Southern Pacific Company; that thereafter, on the following day, to wit, the 28th day of June, 1916, libelant notified claimant and respondent by telegram and letter, a copy of which telegram is hereto attached, marked Exhibit "E," and hereby made a part of this answer with the same force and effect as though pleaded at length herein, that said S. S. "Cacique" was then ready to load said cargo on June 27th, 1916, at nine P. M. That said cargo, however, was, on said 27th day of June, 1916, at said hour of nine o'clock P. M. in the custody and the exclusive control of the United States Marshal for

the Northern District of California, under said process issued out of the above-entitled court at the instance of libelant; that if the loading of said cargo did not commence at the time when libelant gave notice of the readiness of said steamship to load the same, it was due to the act of libelant in attaching said cargo, as aforesaid, and [37] by reason of the further fact that said steamship was then loaded with her inward cargo, and was, as hereafter more specifically alleged in an unseaworthy and unfit condition to load claimant's and respondent's cargo for her outward voyage.

VI.

That at the time of the arrival of said S. S. "Cacique" in the harbor of San Francisco on said 27th day of June, 1916, she was in an unseaworthy condition for her outward voyage, so claimant and respondent is informed and believes, and therefore alleges the fact to be, in that a plate on each side of her stem in No. 6 strake below the sheerstrake was cracked along a vertical line for about 20 inches; in that several gusset plates on each side of No. 2 bottom tank, attached to the top of the tank margins, were leaking and required re-riveting; in that the center line bulkhead of the deep tank was strained and started at the riveting and caulking and a large number of rivets were loose; in that the wood in the lower half of the stern bushing was hammered and broken and parts thereof were missing; and in that other repairs were required upon her boilers, hull and machinery not fully known to

claimant and respondent and as to which it demands a full disclosure thereof.

VII.

That to make said vessel seaworthy and to repair the damages to said steamer existing on her arrival in the port of San Francisco, as aforesaid, it was necessary to drydock her at Hunter's Point Drydock; that said drydocking was done on the evening of said 8th day of July, 1916, immediately following the completion of the discharge of her inward cargo; that she remained on said drydock until the 12th day of July, 1916, and during the period of such drydocking, partial repairs to the aforesaid injuries were made, and to effect the same, some of [38] the tanks of said steamer were, and particularly No. 2 tank was, thoroughly steamed out and cleaned so as to make it safe against the danger of fire and explosion for the workmen to cut out and renew the plates and rivets required in making said repairs; that to admit of access to the stern bushing and to repair the same, the propeller of said steamship was removed and the tail-shaft drawn.

VIII.

That immediately upon being discharged from said drydock and, in fact, before the completion of all the repairs on the hull, boiler and machinery of said steamer, she was taken to Pier 39 in the harbor of San Francisco, where, on the 12th day of July, 1916, she commenced the loading of cargo for her outward voyage, and continued said loading from day to day until the same was completed on the 26th day of July, and thereafter, upon the following day,

said steamer sailed on her voyage to the ports of New Zealand and Australia; that while said steamship was loading her outward cargo at Pier 39 and until about the 20th day of July, 1916, machinists and ironworkers were working, days and nights, making repairs on the hull, boilers and machinery of said steamship.

IX.

Respondent is informed and believes, and so alleges the fact to be, that prior to the arrival of said steamship in the port of San Francisco, and certainly on her arrival, libelant was fully advised of the damaged condition of said vessel, and of her unfit and unseaworthy condition to carry claimant and respondent's cargo, as agreed in and by said contract of February 25th, 1916, and knew that it was impossible to load said cargo during the month of June and that said steamer would have to drydock to undergo the repairs which were, in fact, made upon her; that notwithstanding such knowledge, libelant at no time [39] disclosed the fact of said damages and of the unfit and unseaworthy condition of said steamer to claimant and respondent, but despite the fact that it knew that compliance on its part with the terms and conditions of said contract of February 25th, 1916, was impossible, demanded the delivery into its custody of claimant and respondent's cargo, and peremptorily commenced this action for an alleged breach of said contract and on the 28th day of June, 1916, demanded demurrage on said steamship at the rate of Three Thousand Dollars ($3,000.00) per day at a

time when it had not, and could not, by reason of the fact that said steamship "Cacique" had just arrived in port fully loaded with inward cargo and in an unfit and unseaworthy condition, perform the terms and conditions of said agreement of February 25th, 1916, on its part to be performed and also notwithstanding the fact that said libelant did not load or attempt to load any outward cargo on said steamship until the 12th day of July, 1916.

X.

That libelant has not and did not duly, or at all, perform all or any of the terms, or conditions, or obligations of the said contract of February 25th, 1916, on its part to be performed.

XI.

That all and singular the premises are true.

WHEREFORE, claimant and respondent prays that libelant take nothing by this action, that said libel be dismissed, that claimant and respondent have and recover its costs herein expended and for such other and further relief as to the Court may seem meet and equitable in the premises.

W. F. WILLIAMSON,
IRA A. CAMPBELL,
OSCAR SUTRO,

Proctors for Claimant and Respondent, Ford Motor Company of Canada, Ltd. [40]

State of California,
City and County of San Francisco,
Northern District of California,—ss.

W. F. Williamson, being duly sworn, on oath says:

That he is one of the proctors for the claimant and respondent, Ford Motor Company of Canada, Ltd.; that said claimant and respondent maintains no office and has no agent in the Northern District of California, and for that reason he makes this verification for and in behalf of said claimant and respondent; that he has read the foregoing answer, knows the contents thereof and believes the same to be true.

W. F. WILLIAMSON.

Subscribed and sworn to before me this 31st day of October, 1916.

[Seal] HERBERT BENNETT,

Notary Public in and for the City and County of San Francisco, State of California. [41]

**Exhibit "A."**

San Francisco, February 25th, 1916.

Ford Motor Company,

San Francisco, Cal.,

Gentlemen:

Attention Mr. L. C. Davis.

We confirm freighting engagement as follows:

COMMODITY: 6200 tons (40 cubic feet each) automobiles and parts, in packages.

DATE: $47.50 per 40 cubic feet measurement from San Francisco to Wellington, New Zealand, and/or Sydney, Australia, freight prepaid; quantity for each port to be declared within ten days from date.

SHIPMENT: Per American SS. "Cacique" June loading; when vessel is closer at hand, will advise you more definitely as to exact loading date.

DELIVERY: To be delivered alongside steamer at San Francisco as fast as vessel can load, otherwise shippers to pay demurrage at rate of $3000.00 per day.

Total shipment weighs approximately 1550 tons (2240 pounds each) measuring about four to one.

Yours very truly,
W. R. GRACE & CO.
(Sgd.) H. E. MOORE,
Traffic Manager.

Accepted:
(Sgd.) FORD MOTOR CO. OF CANADA, LTD.
By L. C. DAVIS. [42]

**Exhibit "B."**

San Francisco, June 6, 1916.

Ford Motor Co. of Canada, Limited,
Ford, Ontario.

Gentlemen:

Referring to your letter of June 1st, we are glad to note that you have now arranged for 6099 tons out of the 6200 tons allotted to you and we hope that you will be able to supply the remaining tonnage.

We note with surprise your remarks on the subject of June loading and, of course, do not agree with the contention which you reserve. We certainly cannot understand how, if you were not able to sup-

ply the agreed tonnage by a later date, your plans to supply it at an earlier date could have been disturbed and will accomplish our contract in accordance with its terms.

We enclose copy of our letter of today's date to Mr. Davis of your San Francisco office, from which you will note that shipment must be alongside our vessel on June 27th ready for loading as fast as ship can receive in accordance with our contract of February 25th.

Yours very truly,
W. R. GRACE & COMPANY. [43]

**Exhibit "C."**

June 1, 1916.

Messrs. W. R. Grace & Company,
332 Pine Street,
San Francisco, Cal.

Gentlemen:

We refer to your letter of May 25th.

You have already had detailed reply to your wire of the 18th mentioned in your letter.

Permit us to repeat the information we have already given you with reference to the tonnage for the S. S. "Cacique" by ports as follows:

| | Cubic Feet. | Tons. |
|---|---|---|
| Adelaide | 8,323.91 | 208.10 |
| Brisbane | 16,342.79 | 408.57 |
| Fremantle | 10,014.40 | 250.38 |
| Hobart | 3,421.75 | 85.54 |
| Melbourne | 42,301.99 | 1,057.55 |

| | | |
|---|---|---|
| Sydney | 30,455.25 | 761.38 |
| Wellington | 47,503.12 | 1,187.58 |
| Parts (4 carloads) | 4,622.00 | 116.00 |
| Total | 162,985.21 | 4,075.00 |

In addition we have affected an arrangement with the Union Steamship Company to transfer to you 1500 tons of the tonnage now on the Coast originally contemplated to go forward by Union Steamships.

We understand that you have let 524 tons additional making 6099 tons all told out of the 6200 tons alloted to us.

This letter and the above arrangement is without prejudice to our rights to contend that any engagement purporting to have been entered into on our behalf, has not been carried out by yourselves, in that, such an engagement calls for June loading, which in the parlance must necessarily mean June shipping, whereas we understand the Steamer Cacique will not leave until about the tenth of July.

We have been advised by Mr. Davis, Traffic Manager for Ford Motor Company, San Francisco, that the S. S. Cacique would leave on June 24th and again advised that it would leave on June 14th. Our plans were all laid with this in view, and your sailing date of July 10th has materially disturbed them.

We wish it, therefore, definitely understood that if by reason of the above and other circumstances, our plans for supplying 6200 tons for this vessel do not carry through, we do not consider our obligation binding; in fact, we have so stated to Mr. Davis in

all of our correspondence to him and we presume he has given you ample notice to this effect.

Yours very truly,

FORD MOTOR COMPANY OF CANADA, LIMITED,

Sales Department.

HSP–LS. [44]

**Exhibit "D."**

June 14th, 1916.

Messrs. W. R. Grace & Co.,
332 Pine Street,
San Francisco, Cal.

Gentlemen:

We refer to your letter of June 6th.

Any arrangements that you have made for 6200 tons were effected through Ford Motor Company of San Francisco, which arrangements we do not, and never have considered binding upon this Company, and which information we have previously given you and now repeat.

We have forwarded 4075 odd tons of cargo for your S. S. "Cacique" at an ocean freight rate of $47.50. This is the entire cargo that we will forward for the vessel, and is the cargo that you have been informed from time to time would be forwarded for this vessel. If you wish to accept this cargo, you are at liberty to do so on these terms. If you take the attitude that there is a contract binding upon this Company for 6200 tons space, and attempt to hold this 4075 tons cargo for freight for 6200 tons at the above rate we will decline to load any of the cargo whatever.

It is not necessary for us to go into details for the reasons moving us. You have misunderstood our previous letter upon this subject. That letter was designed to simply show in an argumentative way, that had there been a contract for 6200 tons binding upon this Company, which has never been admitted, but has always been denied, such contract was inoperative by reason of the fact, that your S. S. "Cacique" has already taken out a clearance for July 5th instead of loading and clearing in June.

Our shipments of the 4075 ton quantity, on the basis outlined above, will be ready and alongside your steamer on June 27th as indicated by you.

Yours very truly,

FORD MOTOR COMPANY OF CANADA, LIMITED,

Sales Department.

HSP/LS. [45]

**Exhibit "E."**

TELEGRAM.

San Francisco, Cal., June 28–16.

Ford Motor Co.

Ford.

Please take notice that in accordance with our previous advices the Steamship Cacique was ready to load your cargo contracted for on February 25th, 1916, one June 27th, 1916, at 9 P. M. As you have failed to deliver the cargo alongside steamer as fast as vessel can load, demurrage at the rate of three

thousand dollars $3000.00 per day commences on the day and at the hour last mentioned.

W. R. GRACE & CO.

328 PM.
HSP. [46]

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**Interrogatories Propounded to Libelant Under the Thirty-Second Admiralty Rule.**

1. What injuries were suffered by the SS. "Cacique" on her voyage from San Francisco to Hongkong via Vladivostok which included the month of April, 1916?
2. How and when were they incurred?
3. Were there any entries made in the log-books of the steamer respecting such injuries?
4. If so, what were the injuries described in the log-books and when were they suffered? Attach a copy thereof to your answer.
5. Were there any reports made at Vladivostok or Hongkong in May, 1916, respecting said injuries?
6. If so, what were the injuries to said steamer described in said reports and on what dates were said injuries suffered? Attach a copy of such reports to your answer.
7. Was the steamer drydocked either at Vladivostok or at Hongkong on the voyage in question?
8. If so, what repairs were made to her at either or both of said ports, and on what dates were the injuries so repaired suffered?

9. On the voyage from Hongkong to San Francisco on which she arrived at the latter port on the 27th day of June, 1916, what injuries did she suffer to hull and/or machinery and particularly where did said vessel spring a leak on said voyage?
10. What day and hour thereof did said steamer dock in the port of San Francisco in the month of June, 1916, on arrival on her said voyage from Hongkong? [47]
11. On what day and hour did she commence the discharge of her cargo?
12. Of what did her cargo consist?
13. What quantities and kinds of cargo were stowed in each of the different cargo compartments of said steamer?
14. What quantities and kinds of cargo were discharged from each cargo compartment of said steamer during each of the days intervening between the time when she commenced discharging in June, 1916, and final discharge was completed?
15. What was the total quantity of said cargo discharged from said steamer on each of the days during which said cargo was unloaded?
16. Was the steamer working night and day discharging cargo from the time she commenced discharging until the unloading was completed?
17. On what day was final discharge of all of the cargo completed?

18. On what day were arrangements made by libelant for the drydocking of said steamer at the Hunter's Point drydock?
19. On what day, and hour thereof, was she drydocked in July, 1916?
20. On what day, and hour thereof, was she discharged from said drydock?
21. What repairs were made upon said steamer while upon said drydock?
22. How large was the crack in the plates on each side of the stem?
23. In what strakes below the sheerstrakes were the cracks located?
24. Where did the water go which leaked into the hull of said steamer through said cracks?
25. How many gusset plates in said steamer on each side of No. 2 bottom tank required caulking or repair because leaking where they were attached to the top of the tank margins? [48]
26. What was the defective condition which existed at the time of said drydocking in the center line bulkhead of the deep tank?
27. Was it not strained and started at the riveting and caulking?
28. How and when did it become so strained?
29. Were not a large number of rivets found to be loose therein?
30. What repairs or replacements were made upon or about the center line bulkhead of the deep tank at the time of said drydocking or subsequent thereto?

31. Was the tail-shaft drawn for examination during said drydocking?
32. What damage was found on drydocking to exist in the stern bearings or stern tube?
33. Was not the stern-bush found to be hammered, and was it not renewed?
34. In what way did the damage referred to in the last two interrogatories evidence itself before said vessel was drydocked?
35. What repairs were made upon the boilers of said steamer while she was in the port of San Francisco in July and/or August?
36. On what days were such repairs made?
37. Before the tanks could be examined and/or repairs thereto made, was it not necessary to clean the fuel oil out of said tanks and to steam the same so as to eliminate the gases?
38. What tanks were cleaned and steamed before repairs were made to the steamer?
39. Was not a certificate required from a chemist showing an analysis of the air in the holds and/or tanks of the steamer before the workmen would enter the ship for the purpose of examining and/or repairing said steamer?
40. If said certificate was given, what did it certify to, and on what dates was it furnished, and by whom? [49]
41. In the examination and/or repair of said tanks were not exposed lights, or heated rivets or steel tools used from which there might be danger of an explosion, if any gas had been left in the tanks?

42. Was not this the reason for requiring the cleaning of the tanks and the procuring of the chemical analysis of the air?
43. If not, what was the reason?
44. What repairs were effected to the steamer after she left the drydock?
45. On what day did she begin loading her cargo for the next voyage outward from San Francisco?
46. What were the quantities and kinds of cargo which were loaded in the ship day by day?
47. Where in the various compartments of said steamer were the different packages shipped by respondent stowed? In describing stowage, refer to the packages by their marks.
48. What were the names of the shippers of cargo loaded for said outward voyage?
49. On what day in July was the loading of said steamer completed?
50. How much and what cargo loaded on said steamship "Cacique" for said outward voyage was contracted for by libelant prior to June 26th, 1916.
51. How much and what cargo loaded on said steamship for said outward voyage was contracted for by libelant subsequent to the last named date?
52. What, if any, effort did libelant make to obtain cargo for said steamship for said outward voyage between the 5th and 26th days of June, 1916? [50]

53. What, if any, cargo for the said outward voyage of said steamship was offered to libelant between the 5th day of June and the 25th day of July, 1916?

54. On what day after the arrival of said steamer in the port of San Francisco on June 27, 1916, and after the discharge of her inward cargo, was said steamer fumigated?

55. Who did the fumigating?

56. What chemical was used in fumigating?

57. Did the steamer undergo, while in port, any survey by a surveyor of Lloyds' Register of British and Foreign Shipping?

58. If so, did such surveyor make report of the injuries which he found to exist in said steamer and of the repairs and replacements which were to be made upon said steamer?

59. If so, what were such findings of injuries, repairs and replacements required by him? Attach a copy of such survey reports to your answers.

60. Did said steamer undergo any classification survey while in the port of San Francisco and/or on said drydock? If so what?

61. Was not the drawing of said tail-shaft a part of said classification survey?

W. F. WILLIAMSON,
IRA A. CAMPBELL,
OSCAR SUTRO,

Proctors for Claimant and Respondent Ford Motor Company of Canada, Ltd.

[Endorsed]: Receipt of a copy of the within answer is hereby admitted this 31st day of October, 1916.

ANDROS & HENGSTLER.
GOLDEN W. BELL.

Filed Oct. 31, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [51]

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In the District Court of the United States for the Northern District of California.

No. 16,058.

W. R. GRACE, a Corporation,

Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,

Respondents.

FORD MOTOR COMPANY OF CANADA, LTD.,

Claimant.

**Exceptions to the Answer and Interrogatories of Respondent and Claimant.**

To the Honorable Judges of the United States District Court for the Northern District of California:

W. R. Grace & Co., libelant herein, hereby excepts to the answer and interrogatories of Ford Motor Company of Canada, Ltd., on the following grounds,

I.

That the allegations on page 3 of said answer, beginning on line 12 thereof with the words: "discharge of which" and ending on line 20 thereof with the word "alleged," are insufficient, incompetent, immaterial and irrelevant, do not constitute a defense to the libel, and should be expunged, being allegations of supposed facts alleged to have occurred after respondent had given notice to libelant that it refused to perform its contract and after it had in fact refused to perform the same. [52]

II.

That the allegations on page 6 of said answer, beginning on line 24 thereof with the words: "that said packages were receipted for," and ending on line 28 thereof with the words: "this action," should be expunged, the same being mere argument and false conclusions of law, and otherwise insufficient, incompetent, immaterial and irrelevant.

III.

That the allegations on pages 6 and 7 of said answer, beginning on line 30 of page 6 with the words: "and at said time," and ending on line 12 of page 7 with the words: "would be loaded upon the said steamship 'Cacique,' " should be expunged, the same being insufficient, incompetent, immaterial and irrelevant, and do not constitute a defense to the libel, in so far as they are a statement of the supposed reasons moving respondent to its action, and it appearing from the facts pleaded in the answer and libel that said supposed reasons were not the full

or true reasons for its instructions to said Southern Pacific Company.

IV.

That the allegations on pages 8 and 9 of said answer, reading as follows: "actual shipment of which by water was required to be made during the month of June," should be expunged, the same being uncertain as to who made said requirement, and being insufficient, incompetent, immaterial and irrelevant under the issues of this cause and do not constitute a defense to the libel.

V.

That the allegations on page 9 of said answer, beginning on line 8 with the words "wherein and whereby," and ending on line 14 with the words "Australia," should be expunged, the same being an attempted construction of a contract set forth verbatim in said answer, and being an obviously false construction of said contract. [53]

VI.

That the allegations on pages 11 and 12 of said answer, beginning on line 29 of page 11, with the words: "that at said time a strike," and ending on line 5 of page 12 with the words: "on June 24th, 1916," should be expunged, the same being insufficient, incompetent, immaterial and irrelevant, and do not constitute a defense to the libel in so far as they are a statement of the supposed reasons moving respondent to its action, and it appearing from the facts pleaded in the answer and libel that said supposed reasons were not the full or true reasons for

its instructions to the said Southern Pacific Company.

VII.

That the allegations on pages 12 and 13 of said answer, beginning on line 28 of page 12 with the words: "and thereafter," and ending on line 1 of page 13 with the words, "Southern Pacific Company," should be expunged, the same being insufficient, incompetent, immaterial, and irrelevant, and do not constitute a defense to the libel, in so far as the facts alleged, if true, occurred after respondent had given notice to libelant that it refused to perform its contract, and after it had in fact refused to perform the same.

VIII.

That the allegations on page 13 of the answer, beginning on line 5 with the words: "that claimant and respondent," and extending through the rest of said Article IV, should be expunged, the same being insufficient, incompetent, immaterial and irrelevant, and do not constitute a defense to the libel, in being allegations of supposed facts alleged to have occurred after respondent had given notice that it refused to perform its contract, and after it had in fact refused to perform the same.

IX.

That the allegations on pages 13 and 14 of said answer, beginning on line 22 of page 13 with the words "and also approximately," [54] and ending on line 9 of page 14 with the words: "outward voyage," should be expunged, the same being insufficient, incompetent, immaterial and irrelevant, and

do not constitute a defense to the libel, in that, in so far as the same are allegations of facts, they state facts alleged to have occurred after respondent had notified libelant that it refused to perform its contract, and after it had, in fact, refused to perform the same, and after the libel in this cause had been filed, in so far as said allegations are merely hypothetical and argumentative they are objectionable on that ground.

X.

That the allegations in Article VI, on page 14 of said answer, and the whole of said Article, should be expunged, the same being insufficient, incompetent, immaterial, irrelevant, and do not constitute a defense to the libel, and the facts alleged, if true, having occurred after respondent had notified libelant that it refused to perform its contract, and after it had in fact refused to perform the same.

XI.

That the allegations in Articles VII, VIII and IX, on pages 14 to 16 of said answer, and the whole of each of said articles, should be expunged, the same being insufficient, incompetent, immaterial and irrelevant, and not constituting a defense to the libel, and the facts therein alleged being alleged to have occurred after respondent had notified libelant that it refused to perform its contract, and after it had in fact refused to perform the same, and after the libel in this cause had been filed. [55]

**Exceptions to Interrogatories Propounded to Libelant.**

Libelant excepts to the interrogatories propounded by respondent as follows:

I.

Excepts to Interrogatories 1 to 9, inclusively, and to each thereof, for the reason that they, and each thereof, inquire into matters wholly irrelevant and extraneous to the cause of action and matters not relevant to the issues in this cause; and that the same are impertinent.

II.

Excepts to Interrogatories 11 to 44, inclusively, and to each thereof, for the reason that they, and each thereof, inquire into matters wholly irrelevant and extraneous to the cause of action and matters not relevant to the issues of this cause; and that the same are impertinent.

III.

Excepts to Interrogatories 45 to 51, inclusively, and to each thereof, for the reason that they, and each thereof, inquire into matters wholly irrelevant and extraneous to the cause of action and matters not relevant to the issues of this cause, and that the same are impertinent.

IV.

Excepts to Interrogatory 53 for the same reason as stated in the exceptions to the previous interrogatories herein excepted to, in so far as the said Interrogatory 53 inquires for cargo offered to libelant after the 26th day of June, 1916; but libelant admits

the propriety of said interrogatory if the same is confined to the period between the 5th day of June and the 26th day of June, 1916.

V.

Excepts to Interrogatories 54 to 61, inclusively, and to each thereof, for the reason that they, and each thereof, inquire into [56] matters wholly irrelevant and extraneous to the cause of action and matters not relevant to the issues in this cause, and that the same are impertinent.

ANDROS & HENGSTLER,
GOLDEN W. BELL,
Proctors for Libelant.

[Endorsed]: Due service and receipt of a copy of the within exceptions to answer, etc., is hereby admitted this 11th day of December, 1916.

W. F. WILLIAMSON,
IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Respondent and Claimant.

Filed Dec. 12, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [57]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,058.

W. R. GRACE & CO.,

Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., etc.,

Respondent.

**(Opinion—Overruling Exceptions.)**

ANDROS & HENGSTLER and GOLDEN W. BELL, Esq., Proctors for Libelant.

McCUTCHEN, OLNEY & WILLARD, Proctors for Respondent.

The libel herein is for damages for alleged breach of contract to furnish cargo for shipment by libelant's steamship "Cacique" from San Francisco to Australia. The contract, made in February, 1916, provided that such cargo should be for shipment "per American S. S. 'Cacique,' June loading; when vessel closer at hand, will advise you definitely as to exact loading date."

Respondent claims that "June loading" means that the vessel was to sail in June. Libelant claims that it means that the loading should be commenced in June. In any event, libelant finally advised respondent that the vessel would be ready to receive the cargo on June 27th. Before that day, that is to

say, on June 23, the libel avers that respondent repudiated the contract and advised libelant that no cargo would be loaded thereunder. This alleged repudiation was accompanied by a statement to the effect that respondent would furnish a materially less quantity of cargo than the contract called for, if libelant would accept it and not hold it responsible for the larger cargo contracted for. [58]

On June 27, this libel was filed and the cargo offered was attached under it for breach of the contract to furnish the full amount. The answer sets up that on June 27 the vessel docked from its Oriental voyage and had on board a full inward cargo, discharge of which was not completed until July 8th, and that she was not, because of this fact, and the further fact that she needed repairs, in readiness to take on cargo before July 12. The answer also contains a number of interrogatories bearing upon these facts. The libelant excepts to those portions of the answer, and to all the interrogatories tending to throw any light on them, the theory being that anything occurring after respondent repudiated the contract is not material and is no defense to the libel.

The foregoing is not intended as any complete or detailed statement of the facts pleaded either in the libel or the answer, but only as a broad statement which will sufficiently present the questions involved in the exceptions.

It is quite true that after the renunciation of a contract by one party, the other may consider himself absolved from any future performance of it,

and may sue at once for damages for the anticipatory breach. His right of action accrues at once, but this does not mean that the amount of damages which he may recover may not be affected by after occurrences.

He is entitled to recover for such breach only the damages actually suffered by him because of it. The amount recoverable is not intended as a penalty imposed upon the defaulting party, but as compensation to the other for the damages actually sustained. If no damage results to him either directly or proximately from the breach, then there can be no recovery other than a nominal one. [59]

If in the instant case the contract was renounced by respondent on June 23, as claimed by libelant, and thereafter and on June 26, before the date set for loading, the "Cacique" had sunk, although libelant's right of action accrued on June 23, I am of the opinion that it could not recover, as manifestly the renunciation of the contact would have caused it no damage, because of its own inability to perform due to a cause wholly independent of such renunciation.

The true rule is that a party who has renounced his contract is liable at once to an action for the breach, and that whatever arises afterwards or may arise in consequence of the time not having come or not having expired, should be considered in estimating the damages.

The rule is stated in Roehm vs. Horst, 178 U. S. 1, as follows:

> "As to the question of damages, if the action is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself."

This does not mean that the party not in default must tender performance, and prepare to perform, before he may recover from the defaulting party. It does mean, however, that the defaulting party may show in defense to an action for an anticipatory breach that the other party has suffered no damage therefrom, because of absolute and insurmountable disability on his own part to perform.

If therefore in the present action respondent can show that libelant could not for insurmountable physical reasons have performed its contract, it seems to me, that while its right of action [60] accrued upon respondent's renunciation, the real damage suffered by it because of such renunciation would be governed by the after-occurrences.

As the answer and interrogatories have a direct bearing upon this question, the exceptions will be overruled, and the whole matter left open to be determined upon the trial.

M. T. DOOLING,
Judge.

June 29th, 1918.

[Endorsed]: Filed Jun. 29, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [61]

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In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,058.

W. R. GRACE & CO.,

Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., etc.,

Respondent.

**Answers of W. R. Grace & Co., a Corporation, Libelant, to the Interrogatories Propounded by Respondents.**

1. Answer to Interrogatory No. 1: Damage on Fore Deck: to center plate of breakwater; to hood of stairway leading to shelter deck; to port and starboard hawse pipes and chain pipes; to bed of windlass; to frame of port winch; to exhaust pipes, and to air and sounding pipe. On After Deck: to steam pipe connections. In Lower Hold No. 2: to fuel oil bulkhead, and shell plates. In Engine Room: to discharge pipe for bilges and oil transfer pump; to crank pin for intermediate engine.
2. Answer to Interrogatory No. 2: Through very heavy weather between April 7th and May 1st, 1916.

3. Answer to Interrogatory No. 3: Yes.
4. Answer to Interrogatory No. 4: April 10th: Hatch batten to No. 1 hatch washed away.
   April 11th:) Considerable damage to gear
   April 12th:) about decks, etc., as specified in
   April 13th:) answer to Interrogatory No. 1.
   April 18/25th: Damage to machinery as specified in answer to Interrogatory No. 1: Tanks strained and leaking.
   Extract of Captain's log attached and marked Exhibit "A."
5. Answer to Interrogatory No. 5: Yes, at both places.
6. Answer to Interrogatory No. 6: Report of Survey at Vladivostok attached and marked Exhibit "B"; Report of Survey at Hongkong attached and marked Exhibit "C."
   The interrogatory is answered by Exhibits "A," "B" and "C." [62]
7. Answer to Interrogatory No. 7: The steamer was drydocked at Hongkong.
8. Answer to Interrogatory No. 8: Deck and machinery damage, as shown in the above answers and reports, was repaired; the deep tank was made tight by caulking and riveting. Temporary repairs were made on tanks in No. 2 hold. The dates on which the injuries so repaired were suffered appear in the previous answers, and in particular in Exhibit "A."
9. Answer to Interrogatory No. 9: One plate on each side of the stem in 6th strake below

sheer strake cracked in a vertical direction for about twenty inches. Rivets of six gusset plates on each side of No. 2 double bottom tank started and leaking. Centerline bulkhead of deep tank started and leaking, a large number of rivets being loose. Wood in lower half of stern bush hammered, four pieces of the wood broken and part missing. Leak in forepeak.

10. Answer to Interrogatory No. 10: At 7:30 A. M. on June 27th, 1916.
11. Answer to Interrogatory No. 11: Immediately after arrival at her dock.
12. Answer to Interrogatory No. 12: Chinese merchandise.
13. Answer to Interrogatory No. 13: The kinds, respective quantities and distribution of the cargo are shown in the stowage plan attached hereto and marked Exhibit "D."
14. Answer to Interrogatory No. 14: There is no record in existence; it is therefore not possible to answer this question.
15. Answer to Interrogatory No. 15: There is no record in existence; it is therefore not possible to answer this question for each day of the discharge. An approximate calculation of the average discharge per day gives 643 tons. The actual discharge was slow and intermittent, on account of the prevailing strike of longshoremen and the consequent necessity of employing incompetent nonunion labor. Had there been no strike, and compe-

tent stevedores available, the steamer could have been completely discharged before June 30th.

16. Answer to Interrogatory No. 16: No.
17. Answer to Interrogatory No. 17: On July 8th, 1916.
18. Answer to Interrogatory No. 18: On July 8th, 1916.
19. Answer to Interrogatory No. 19: On July 8th, 1916, about 6 P. M.
20. Answer to Interrogatory No. 20: On July 11th, 1916, at 6 P. M.
21. Answer to Interrogatory No. 21: The two fractured plates at stem were renewed. The gusset plates in No. 2 tank were re-riveted and caulked. The riveting of the centerline bulkhead was renewed, and caulking overhauled and made good. The wood in lower half of sternbush was renewed, tail-shaft replaced, propeller refitted and secured. [63]
22. Answer to Interrogatory No. 22: About twenty inches long.
23. Answer to Interrogatory No. 23: In 6th strake below sheer strake.
24. Answer to Interrogatory No. 24: Into the forepeak tank.
25. Answer to Interrogatory No. 25: Six gusset plates were riveted.
26. Answer to Interrogatory No. 26: It was strained and started at the riveting and caulking.

28. Answer to Interrogatory No. 28: Impossible to answer with certainty, except by inference from facts stated in preceding answers.
29. Answer to Interrogatory No. 29: Yes.
30. Answer to Interrogatory No. 30: Answered in answer to Interrogatory 21.
31. Answer to Interrogatory No. 31: Yes.
32. Answer to Interrogatory No. 32: The wood in lower half of stern-bush hammered, four pieces of the wood broken and part missing.
33. Answer to Interrogatory No. 33: Yes.
34. Answer to Interrogatory No. 34: Have no knowledge as to whether there was any evidence of the damage before it was discovered in drydock.
35. Answer to Interrogatory No. 35: No repairs.
36. Answer to Interrogatory No. 36: None were made.
37. Answer to Interrogatory No. 37: Yes.
38. Answer to Interrogatory No. 38: Deep tanks, forepeak tanks, No. 2 double bottom tanks.
39. Answer to Interrogatory No. 39: Yes.
40. Answer to Interrogatory No. 40: Copies of the certificates are attached hereto marked Exhibit "E," which said copies answer the interrogatory.
41. Answer to Interrogatory No. 41: Yes.
42. Answer to Interrogatory No. 42: Yes.
43. Answer to Interrogatory No. 43: ———.
44. Answer to Interrogatory No. 44: Usual minor overhauling while vessel was loading. [64]

45. Answer to Interrogatory No. 45: On July 12th, at 9 A. M.
46. Answer to Interrogatory No. 46: No record in existence; hence cannot answer.
47. Answer to Interrogatory No. 47: They were stowed as in the annexed stowage plan marked Exhibit "F."
48. Answer to Interrogatory No. 48: San Francisco Sulphur Co., Cudahy Packing Co., Atchison, Topeka & Santa Fe Ry., Western Pacific Ry., Southern Pacific Ry., General Roofing Co., Petroleum Products Co., Winslow Bros. & Smith Co., Cameron Bros., San Francisco Sulphur Co., Shell Oil Co. of California, Illinois Pacific Glass Co., Macondray & Co., W. R. Grace & Co., California Paint Co., W. P. Fuller & Co., John Dunn Son & Co., Ford Motor Car Co., Grant Powder Co., American Trading Co., E. I. dupont De Nemours.
49. Answer to Interrogatory No. 49: July 26th.
50. Answer to Interrogatory No. 50: 6200 tons for respondent's autos, 2358.5 tons for outsiders.
51. Answer to Interrogatory No. 51: 1121 tons, of which 500 tons was deck cargo.
52. Answer to Interrogatory No. 52: No effort.
53. Answer to Interrogatory No. 53: Cannot say, as records do not show any.
54. Answer to Interrogatory No. 54: July 11th.
55. Answer to Interrogatory No. 55: A United States quarantine official.

56. Answer to Interrogatory No. 56: Cyanide and sulphuric acid.
57. Answer to Interrogatory No. 57: Yes.
58. Answer to Interrogatory No. 58: Yes.
59. Answer to Interrogatory No. 59: As appears by copy of survey report attached, marked Exhibit "G."
60. Answer to Interrogatory No. 60: Yes, the annual survey of boilers.
61. Answer to Interrogatory No. 61: No. [65]

City and County of San Francisco,
Northern District of California,—ss.

Gale H. Carter, having made the foregoing answers on behalf of libelant W. R. Grace & Co., and being sworn, says: That the said answers to the interrogatories propounded by respondents are true to the best of his knowledge and belief.

GALE H. CARTER.

Sworn to before me this 26th day of August, 1918.
[Seal] S. I. CLARK,
Notary Public in and for the City and County of San Francisco, State of California. [66]

**Exhibit "A."**

ABSTRACT OF LOG

Covering Heavy Weather Damage.

ABSTRACT OF LOG S. S. "CACIQUE" ON VOYAGE FROM MEJILLONES, CHILE, TO VLADIVOSTOCK, RUSSIA, VIA TOCOPILLO, CHILE, VIA PAYTA, PERU, VIA SAN FRANCISCO, CALIFORNIA, UNITED STATES OF AMERICA.

Arrived at Mejillones, Chile, from Santos, Brazil, February 25th, 1916. Loaded 5000 tons Nitrate. Finished loading Nitrate and sailed Monday, March 6th, 1916, for Tocopillo for fuel oil.

Arrived at Tocopillo and received fuel oil and sailed March 7th, 1916, for Payta, Peru, for fuel oil.

Arrived Payta, Peru, Sunday March 12th, 1916. Received fuel oil and sailed for San Francisco 7:40 P. M. March 12th, 1916.

Arrived at San Francisco, Tuesday, March 28th, and commenced discharging coffee from Santos, Brazil, and load cotton and machinery for Vladivostock, Russia. Ship's draught sailing: Forward 27′ 08″; Aft 27′ 04″.

Tuesday April 4th, 1916, finished loading cargo for Vladivostock and sailed April 5th A. M. Weather condition sailing fine and clear, with fresh N. W. breeze force 5 BOUF. scale choppy N. Wly. sea.

April 6th: Fair weather, mod. sea, breeze and swell;

April 7th: Cloudy and overcast, large head swell. Choppy sea, vessel shipping large quantities of water over forward decks. Ship pitching and laboring heavy.

April 8th: Fresh Sly. breeze with confused rough sea and heavy Wly. swell. Vessel rolling and pitching and laboring heavy. Shipping heavy seas over decks continually.

April 9th: Overcast, misty with strong W. S. W. breeze, heavy sea and swell. Vessel pitching, rolling and laboring heavy. Shipping heavy seas over decks continually.

April 10th: Moderate S. W. gale with mountainous head sea and swell. Vessel straining and laboring and pitching heavy, engine slowed down 6:20 A. M., boarded heavy head sea washing away hatch batten to No. 1 Hatch. Ship under dead slow speed. Seaman O. Howard injured by sea boarded ship while securing No. 1 Hatch. Ship hove to. Damage to cargo unknown. 8:00 o'clock hatch secured, ship proceeding ahead slow. Decks flooded continually.

April 11th: Heavy S. Wly. gale force 9, ship hove to. Vessel rolling, pitching, laboring, and straining heavy. Shipping heavy seas on decks continually doing considerable damage to gear about decks, carrying away breakwater fastenings bending exhaust pipes to steam winch lines, bending pipe guards, carrying away vent pipe to No. 2 double bottom tank. Carried top tarpaulin to No. 1 Hatch.

Broke plug-cock on exhaust line, bending and breaking valve to steam fire extinguishers line to No. 2 Hold. Decks flooded continually. Heavy snow and hail squalls. [67]

#2

ABSTRACT OF LOG—Cont'd.

April 12th: Strong S. W. gale, heavy mountainous high sea and swell, vessel straining and groaning and laboring heavy. Shipping heavy seas over deck, doing considerable damages about decks, straining plates under Hawser pipes, causing heavy leak to fore peak, found 3 ft. of water in fore peak store room, scupper pipes broken and plugged. Carried away cover to sounding pipe to No. 1 bilge, causing water to leak through deck. Discharge pipe from bilge pump carried away. Decks flooded continually.

April 13th: Tremendous heavy Wesly. Snow and hail squalls, accompanied by mountainous high sea and swell. Vessel pitching, rolling and laboring and straining heavy, shipping tremendous seas on decks. Found discharge pipe to oil transfer pump strained and leaking. Steering gear chains strained and stretched. Decks flooded continually. Engines racing heavy.

April 14th: Squally weather heavy sea and swell. Vessel pitching, rolling and laboring heavy. Shipping heavy seas over decks continually.

April 15th: Cloudy and overcast. Fresh N. W. gale, heavy sea and swell, vessel pitching, rolling and laboring very heavy. Straining, shipping

heavy seas over decks, engines racing heavy during pitching, sea increasing.

April 16th: First part of the day partly clear, later heavy overcast with increasing force of wind and sea. Vessel pitching and rolling and laboring continuously, shipping heavy seas over decks. Engines racing continually, vessel straining, deck flooded, boarding large heavy seas.

April 17th: Cloudy and overcast. Fresh breezes, squally heavy sea and swell. Vessel pitching and laboring heavy, shipping, heavy seas over decks continually, vessel straining.

April 18th: Squally stormy weather, vessel pitching and laboring very heavy mountain high seas and swell. Vessel racing continually 7:18 A. M. stopped engine. Found one set of crank pin brasses broke and parting piece for crank pin brasses cracked. Engineers making repairs. 12:03 P. M. repairs to engines completed. Continued slow and a half speed ahead. Sounding of bilges showed oil and water in No. 2 bilges, both sides bilge pumps working continually.

April 19th: Squally weather. Wind, sea and swell moderating gradually; vessel shipping water on deck at intervals. Bilge pump working continuously.

April 20th: At 6:45 A. M. sounding of bilges showed No. 2 port bilge 4 ft.; and no 2 starboard 1 ft. 8 in. consisted of oil and water. Bilge and auxiliary pumps working continuously. Fine weather, smooth sea, small swell. Bilge pumps working throughout. At 6:00 P. M. sounding

showed No. 2 port bilge 4 ft. .03 in. a gain of 4 inches during 12 hours. Thick oil mixed with water, apparently leak from deep tank due to straining of ship.

April 22nd: Fair weather, small sea and swell. Six o'clock sounding of bilges, found No. 2 port bilge containing 4 ft. 6 in. of water and oil, pumps working continuously. [68]

#3.

ABSTRACT OF LOG—Cont'd.

April 23d: Overcast misty weather, gentle Wly. winds, moderate sea and swell increasing. Bilges sounding showed No. 2 port bilge 4 inches, starboard 7″, pumps taking care of water.

April 24th: Cloudy overcast weather, choppy sea increasing, moderate Wsly. swell increasing, occasional snow squalls. Sounding of bilges showed No. 2 port 1 ft. 7 in. starboard 4″. Pumps working at regular intervals.

April 25th: Fine weather throughout, gentle sea and swell. Soundings of bilges showed No. 2 port 1 ft. 8″, starboard 1 ft. 7″, oil and water. Pumps working at regular intervals.

April 26th: From fine clear weather to moderate Wsly. gale, with heavy sea and swell. Vessel plunging and laboring heavy. Shipping heavy seas over decks. Bending and breaking steam pipe to No. 4 winch. Pumps working on bilges continually. Sounding of bilges not obtained on account of heavy weather.

April 27th: Heavy gale from westward with force of 10. Mountain high seas and swell. Vessel

plunging, rolling and laboring very heavy. Shipping large volume of water over decks. Decks flooded continuously. Bilge pumps working throughout. Ship hove to, part of time. No soundings of bilges obtainable on account of heavy weather.

April 28th: Weather moderating throughout. Sea and swell gradually moderating. Vessel shipping water on deck at intervals. Sounding of bilges showed No. 2 port 1 ft. 6 in. starboard 1 ft. 1 in. Pumps working continually.

April 29th: Clear and fine first part, later cloudy, overcast and misty with fresh S. W. wind and increasing choppy sea and swell. Bilge pumps working at regular intervals. Sounding of port bilges not obtainable on account of heavy seas. No. 2 starboard 2 inches.

April 30th: Misty drizzling weather, gentle sea, swell and breezes. Soundings of bilges showed No. 2 Port 1 ft. 4″. No. 2 Starboard, 1 ft. 4″. Pumps working at intervals.

May 1st: Fine weather throughout, smooth sea. 9:25 P. M. ship anchored outside of Vladivostock, entrance to Harbor.

(Copy.) [69]

**Exhibit "B."**

REPORT OF SURVEY—VLADIVOSTOK.

At the request of Messrs. Butterfield & Swire, Acting Lloyd's Agents at the port of Vladivostock we, the undersigned, proceeded on board the steamship "Cacique" of New York, 4543 tons net register, which left San Francisco on 5th April, 1916, arriving at Vladivostock on 2d May, 1916, with a general

cargo in order to survey damage to steamer said to have been incurred on the voyage.

We found as follows:

FORE DECK.

Center plate of breakwater, rivets started and broken away from the hood of stairway loading to shelter deck.

Port and starboard hawse pipes leaking very badly.

Port and starboard chain pipes leaking very badly.

Bed of windlass loose.

Frame of port winch cracked.

Exhaust pipes on fore deck leading to winches bent badly and drain cock carried away.

Air pipe broken and stay carried away in way of foremast.

Sounding pipe broken in way of mast port side.

AFTER DECK.

Steam pipe connections to No. 4 winch broken.

LOWER HOLD No. 2.

Found a large quantity of fuel oil among lower tiers of cargo and bilges on both sides full of oil. Many rivets started and leaking from fuel oil bulkhead tank. Several rivets in shell plates leaking in port wing.

ENGINE-ROOM.

Discharge pipe for bilges broken, discharge pipes for oil transfer pump leaking badly in joints. Crank-pin for intermediate engine and brasses scored badly.

There is evidence of fuel bulkhead having been

wing near the turn of bilges.

We recommend the steamer to proceed to a port to be dry-docked for examination of bottom and further examination of damage. The steamer having encountered very heavy weather on voyage, in our opinion the above damage was thereby sustained. For further particulars see Log Book. The steamer

Port of Survey—Vladivostok—Cont'd.

is in a [70] seaworthy condition to proceed to any port in China or Japan to execute repairs.

In witness whereof we have drawn up and signed this survey report at Vladivostok this day, 28/12th, May, 1916.

P. J. GREGGANS,
Superintendent Panama and Far Eastern Lines.
G. H. BAIDING (Signed),
Master Mariner.

At the request of Messrs. Bryner Kousnetzoff & Co., Agents for the American Steamer "Cacique," we have appointed the above P. J. Greggans and H. Baiding to survey and report upon alleged damage to the above mentioned steamer "Cacique," and we believe full confidence may be placed in their report.

Without prejudice to Underwriters' interests.

Vladivostock, 28/12th, May, 1916.

Per pro. BUTTERFIELD & SWIRE,
(Signed) J. W. TAYLOR,
Acting Lloyd's Agents.

Survey Fee: Rbls. 300.

Received—P. J. GREGGANS.
G. H. BAIDING,
Master Mariner.

(Copy.) [71]

**Exhibit "C."**

(Copy.)

REPORT OF SURVEY—HONGKONG.

Hongkong, May 25th, 1916.

THIS IS TO CERTIFY that

JOHN LAMBERT,

the undersigned surveyor to this Society, did at the request of Messrs. Gilman & Co., Lloyd's Agents, proceed on board of the American Screw Steamer "Cacique" of New York, No. 64 in the Register Book, J. E. Miller, Master, vessel lying afloat in Hongkong Harbor, for the purpose of ascertaining the nature and extent of damage stated to have been sustained to the vessel through encountering bad weather in the Pacific Ocean, whilst on a voyage from San Francisco to Vladivostok, where vessel arrived with considerable deck damage and damage to cargo, which is stated to have been occasioned by fuel oil leaking from deep tank and/or double bottom tank in No. 2 Hold, the deck damage being surveyed at Vladivostock and reported by Lloyd's Agents at that port; for further particulars see Log Book, Vladivostock Surveyor's report and report as follows:

On receiving a report on board as to the condition of vessel, it was decided that an examination be made in drydock, the vessel being subsequently placed in Taikoo Dock, which showed no damage to bottom or shell plating except a few rivets started which required caulking or removal.

On examination of No. 2 hold and deep tank, it was recommended that all ceiling be lifted, and all casing removed from bulkhead of deep tank, the deep tank tested by a head of water twelve feet above crown of tank, and that the double bottom tank in way of No. 2 Hold be tested. Ceiling was saturated with fuel oil.

The following deck damage was also found:

Breakwater started from its fastenings to companionway hood.

Port and starboard hawse pipes started and leaking badly into fore peak.

Port and starboard chain pipes started and leaking badly into chain locker.

Windlass started and bed of windlass loose.

Frame of port winch cracked.

Fore deck exhaust pipe damaged.

Air pipe and stay at foremast carried away.

Two sounding pipes at foremast broken.

After deck steam pipes damaged.

One bilge discharge pipe broken.

Oil pipes started and broken.

A number of scupper pipes broken.

No. 1 hatch tarpaulin damaged and hatch cleat broken.

No. 2 HOLD.

On lifting ceiling and cleaning up the hold it was found that a hole three or four inches long and about an inch wide was made in tank top plating in hatchway space as if some [72] heavy weight,

#2

Report of Survey—Hongkong—Cont'd.

such as a plate or perhaps hatch beam had been dropped and also on putting a pressure on the double bottom tank, a number of leaks were found at tank side brackets.

On removing casing at bulkhead of deep tank it was found that a number of rivets, seams and stiffeners were leaking.

MACHINERY.

Bilge discharge pipe broken and a number of oil connection pipes started.

Intermediate pressure crank-pin brass damaged.

RECOMMENDATIONS.

The No. 2 Hold be cleaned and coated and new ceiling laid. The double bottom tank being full of fuel oil it was recommended that a plate be fitted over hole as a temporary repair tapped on, until a permanent repair could be made.

On testing tank and finding side brackets leaking and there being no time to do the repairs, it was decided that the repairs to same might be postponed to a convenient opportunity provided no oil or water be carried in No. 2 double bottom tank until repairs be effected and tank retested.

That the deep tank be made tight, by renewing rivets and caulking seams as found necessary and tank again tested on completion of repairs.

DECK DAMAGE.

Breakwater to be repaired by renewing the rivets at companionway hood.

Port and starboard hawse pipes taken out and refitted and fore peak cleaned and coated.

Port and starboard chain pipes to be refastened and chain locker recoated.

Windlass to be lifted, bed renewed and windlass refastened.

Frame of port winch to be repaired.

Foredeck exhaust pipes to be repaired.

Air pipe and stay at foremast to be renewed.

Two sounding pipes to be repaired.

After deck steam pipes to be repaired.

One bilge discharge pipe to be repaired.

Oil suction and discharge pipe to be overhauled and repaired as found necessary.

A number of scupper pipes to be repaired.

No. 1 Hatch tarpaulin to be renewed and hatch cleat renewed.

A quantity of dunnage wood and mats destroyed to be renewed.

MACHINERY.

Bilge discharge pipe and oil fuel pipes to be repaired.

Intermediate pressure crank pin brass to be remetalled.

(Signed) JOHN LAMBERT,
Surveyor to Lloyd's Register, Hongkong. [73]

#3.

Report of Survey—Hongkong—Cont'd.

We, the undersigned Agents for Lloyd's, hereby certify that we have employed Mr. John Lambert to survey and report upon the S. S. "Cacique," and

believe that full confidence may be placed in his report.

Hongkong, 29th May, 1916.

(Signed) GILMAN & CO.,
Lloyd's Agents. [74]

FINAL REPORT OF SURVEY—HONGKONG.

Hongkong, May 25, 1916.

CONTINUATION OF DAMAGE REPORT DATED MAY 25, 1916.

All the repairs enumerated in Mr. Lambert's damage report dated May 25th have now been done to his and/or my satisfaction, except the No. 2 double bottom tank which requires to be permanently repaired and tested before oil or water is carried in this compartment, and replacing of wood casing on the bulkhead of deep tank, which is to be replaced on ship's arrival at Shanghai.

The No. 2 hold may be recoated at owners' convenience.

Attached is a memo of oil stated to have been lost, signed by master and officers.

(Signed) FINLAY MILLER,
Acting Surveyor to Lloyd's Register,
Hongkong.

We, the undersigned, Agents for Lloyd's, hereby certify that we have employed Mr. J. Finlay Miller to Survey and report upon the S. S. "Cacique" and believe that full confidence may be placed in his report.

FEE for Survey and Report—$425.

Hongkong, 29th May, 1916.

(Signed) GILMAN & CO.,
Lloyd's Agents.

(Copy.) [75]

**Exhibit "E."**

San Francisco, July 3, 1916.
9:30 A. M. Pier 26.

I hereby certify that ————
————deep tanks————
————Port and Starboard————
————Starboard
————Port
on the S. S. "Cacique"————were this day inspected————by me and found to contain no explosive gaseous mixture only————
Safe for riveting as noted below.
————Safe for men to work in. No naked lights permitted.
————Must be blown out before riveting.
————Blowers must be kept running during riveting.
————Contain Oil; need further cleaning.
Remarks: ————Deep tanks and bilgers must be thoroughly cleaned with blowers running
————

BRYANT S. DRAKE,
Chemical Engineer. ETF.

(Copy.) [76]

San Francisco, July 10th, 1916.
9:30 A. M.

I hereby certify that tanks————forepeak
————Port and Starboard
————Starboard
————Port
on the S. S. "Cacique"————was this day inspected by me and found to contain no explosive gaseous mixture.
Fore peak Safe for riveting as noted below.
Fore peak Safe for men to work in. No naked lights permitted.
Fore peak must be blown out before riveting.
#2 Double Bottoms Contain Oil; need further cleaning.
Remarks: ————

BRYANT S. DRAKE,
Chemical Engineer. [77]

San Francisco, July 11th, 1916.
9:30 A. M.

I hereby certify that tanks————
#2 double bottoms————Port and Starboard
————
————Starboard
————Port
on the S. S. "Cacique"———— was this day inspected by me and found to contain no explosive gaseous mixture.
————all————Safe for riveting as noted below.
————all————Safe for men to work in.

————all————Blowers should be kept running during riveting.

Remarks: ————

BRYANT S. DRAKE,
Chemical Engineer. [78]

**Exhibit "G."**

REPORT OF SURVEY—SAN FRANCISCO
HEAVY WEATHER DAMAGE

San Francisco, 2d August, 1916.

THIS IS TO CERTIFY THAT
JOSEPH S. BLACKETT,

the undersigned Surveyor to this Society did at the request of Messrs. W. R. Grace & Company, Owners of the Steel Screw Steamer "Cacique" of New York, 6202 tons gross register, make further examination of the said vessel in order to ascertain the nature and extent of damage stated to have been sustained through encountering heavy weather in April, 1916, while on a voyage from San Francisco to Hongkong via Vladivostock. For particulars, see Log-books and special damage reports issued and dated Vladivostok, May 12th, 1916, and Hongkong May 25th, 1916.

It appears that after the vessel left Hongkong on her return to San Francisco a leak developed in the fore peak, and recommendations were made by the undersigned for vessel to drydock for examination. On July 10th and subsequent dates while the vessel was lying on drydock and afloat at this

port with the tail shaft drawn as recommended the undersigned upon examination found:

One plate on each side of stem in 6th strake below sheerstrake cracked, the cracks in each case extending in a vertical direction for about 20 inches.

The rivetting of six gusset plates on each side of No. 2 double bottom tank where attached to top of tank margins started and leaking.

The centerline bulkhead of deep tank strained and started at the rivetting and caulking, a large number of rivets there being very loose.

The wood in lower half of stern-bush hammered and four pieces of the wood broken and part missing.

RECOMMENDED:

The vessel's bottom to be cleaned and painted.

Both fractured plates at stem to be cut out and renewed.

No. 2 tank to be thoroughly steamed out, the leaking gusset plates to be rivetted and caulked and tank afterwards tested to rule requirements.

The deep tank to be thoroughly steamed out and the whole of the rivetting of centerline bulkhead to be cut out and renewed and caulking overhauled and made good, the center line to be tested with water on completion of repairs.

The wood in lower half of stern-bush to be renewed, tail-shaft replaced, propeller refitted and secured.

These repairs have now been completed to my satisfaction.

(Signed) J. S. BLACKETT,
Surveyor to Lloyd's Register.

(Copy.) [79]

[Endorsed]: Due service and receipt of a copy of the within answers to interrogatories is hereby admitted this twenty-sixth day of August, 1918.

W. F. WILLIAMSON,
IRA A. CAMPBELL,
Proctors for Respondent.

Filed Aug. 28, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [80]

**(Libelant's Exhibit No. 1.)**

(COPY.)

San Francisco, February 25th, 1916.

Ford Motor Company,
San Francisco, Cal.

Gentlemen:

Attention Mr. L. C. Davis.

We confirm freighting engagement as follows:

COMMODITY: 6200 tons (40 cubic feet each) automobiles and parts, in packages.

RATE: $47.50 per 40 cubic feet measurement from San Francisco to Wellington, New Zealand, and/or Sydney, Australia, freight prepaid; quantity for each port to be declared within ten days from date.

SHIPMENT: Per American S. S. "Cacique," June loading; when vessel is closer at hand, will advise you more definitely as to exact loading date.

DELIVERY: To be delivered alongside steamer at San Francisco as fast as vessel can load, otherwise shippers to pay demurrage at rate of $3000.00 per day.

Total shipment weighs approximately 1550 tons (2240 pounds each) measuring about four to one.

Yours very truly,

W. R. GRACE & CO.,

(Sgd.) H. E. MOORE,

Traffic Manager.

Accepted:

(Sgd.) FORD MOTOR CO. OF CANADA, LTD.,

By L. C. DAVIS.

[Endorsed]: United States District Court. No. 16,058. Grace Co. vs. Ford M. Co. of Canada. Lib. Exhibit No. 1. Filed Nov. 15, 1920. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [81]

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In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

Before Hon. MAURICE T. DOOLING, Judge.

W. R. GRACE & CO., INC.,

Libelant,

vs.

FORD MOTOR CO. OF CANADA, LTD., a Corporation,

Respondent.

**(Testimony Taken in Open Court.)**

Monday, November 15, 1920.

COUNSEL APPEARING:

For the Libelant: L. T. HENGSTLER, Esq.

For the Respondent: E. J. McCUTCHEN, Esq., W. F. WILLIAMSON, Esq., and F. P. GRIFFITHS, Esq.

Mr. HENGSTLER.—If the Court please: In the case of Grace vs. Ford, Mr. Carter, the manager of W. R. Grace & Co. had to go East, to New York, a short time ago, by reason of the serious illness of his wife; he is on his way back to San Francisco for the purpose of attending this trial. We have a telegram from him, that he will arrive this afternoon, on the Overland, at 1:30. He is the one gentleman on our side who knows all the facts of this case, and will be our chief witness. On that ground, I would ask your Honor to continue the beginning of this case until two o'clock this afternoon.

The COURT.—Any objection to that? [82]

Mr. McCUTCHEN.—We have not any objection, your Honor, but I think it proper to state to the Court, before that course is acted upon, that we have a witness who is scheduled to leave for Honolulu on Wednesday. He is a very important witness to us, and one whom we would not want to call out of order. I have suggested to Mr. Hengstler whether it would not be possible for him to take up the two hours of the morning session—I think it

is not inappropriate to suggest to your Honor that the contract, for the breach of which this action is brought, was made on behalf of Grace & Co. by Mr. Moore, who was the Traffic Manager of Grace & Co. at the time the contract was made; Mr. Moore is in attendance here, and will undoubtedly be a witness. I would think it quite probable that the direct and cross-examination of Mr. Moore would consume at least two hours; there will be considerable correspondence to offer. While, as I say, I, or my associates, do not intend to object to the granting of the continuance, perhaps counsel could utilize this time.

The COURT.—If you have any witness here, Doctor, why can't we use the time at our disposal this morning?

Mr. HENGSTLER.—It is possible to do so, your Honor, to spend the time this morning, but I am under a disadvantage in the absence of Mr. Carter, because he is the one man who, from the beginning, had charge of this whole matter. Mr. Moore consulted with him. I have to begin the case being a little in the dark about several of the important facts I have to ascertain from Mr. Carter. I can go ahead, if these gentlemen insist upon it, now, but I am under that disadvantage. I think such a short continuance, in view of the facts, should be granted.

The COURT.—How long is it going to take to present your [83] side of the case?

Mr. HENGSTLER.—I think it will probably take me this afternoon and to-morrow morning.

The COURT.—Do you think you can do it by to-morrow noon?

Mr. HENGSTLER.—I think so, your Honor. I think, as far as I can say now, our case will be finished by to-morrow noon.

The COURT.—And your witness wants to leave on Wednesday morning, Mr. McCutchen?

Mr. McCUTCHEN.—Yes, your Honor, he is positively scheduled to leave on Wednesday morning. I would not want to put him on the stand before counsel has finished his case.

The COURT.—I think perhaps we had better proceed, Doctor, as far as we can this morning.

Mr. HENGSTLER.—Very well, your Honor.

If the Court please, this is a case of considerable importance, and in view of that fact it may be well to present to the Court an outline of the facts which the libelant proposes to prove in this case.

The case is based upon a contract dated February 25, 1916, made between W. R. Grace & Co., the libelant in this case, and the Ford Motor Co. of Canada, the respondent. It is a freighting agreement for space for 6200 tons of automobiles, to be transported to Wellington, New Zealand, and Sydney, Australia. The main provision of the contract refers to a shipment, and it is headed by the word "Shipment," and reads as follows:

> "Per American S. S. 'Cacicue' June Loading. When vessel is closer at hand will advise you more definitely as to exact loading date."

The letter is signed by L. C. Davis. Mr. Davis at the time [84] was the Traffic Manager of the

Ford Motor Co. at San Francisco. The 'Cacicue' that is mentioned in the contract was a tramp steamer, under control of W. R. Grace & Co., the libelant, and at that time en route from Baltimore to San Francisco, through the Straits of Magellan.

When Mr. Davis came to W. R. Grace & Co. for the purpose of finding an appropriate vessel to carry this large tonnage to Australia and New Zealand, W. R. Grace & Co. figured upon different vessels that could load such a cargo, and finally proposed to Mr. Davis the "Cacicue," explaining to him that the "Cacicue" was then engaged on that voyage, and would shortly arrive at a nitrate port, at Mejillones, would load nitrate there, with the destination of Vladivostok, and would, after that, proceed to one or two fuel ports, and then from there proceed to San Francisco, where she was to discharge a cargo, a cargo which was being carried, I think, from Baltimore; that thereafter she would load at San Francisco a cargo of machinery and cotton for Vladivostok; that then she would return from Vladivostok to San Francisco.

It was explained to Mr. Davis that her first arrival in San Francisco would be some time in March, probably toward the end of March; that her second arrival at San Francisco after the voyage to Vladivostok was expected to be in June.

Mr. Davis, for the Ford Motor Co., and Mr. Harvey E. Moore for W. R. Grace & Co.—he was the Traffic Manager of W. R. Grace & Co. at the time—and Mr. Carter, the Manager of W. R. Grace & Co., had a number of meetings preparatory to the

execution of this contract. During those meetings it was explained to them that the autos to be carried in the "Cacicue" were to leave the Ontario factory, the factory at [85] Walkerville, Ontario, during the month of May. As a matter of fact, the first shipment of automobiles left Walkerville on the 1st of May.

On May 13th Mr. Davis sent a letter to W. R. Grace & Co., which I will read to your Honor:

"W. R. Grace & Co.,

"332 Pine Street,

"San Francisco, Calif.

"Gentlemen:

"Attention Mr. Moore.

"We are in receipt of letter from our Canada factory in which they enclose the following telegram:

"Refer wire twenty-eight relative autos shut out steamer 'West Mieth.' Norton now offer rate forty dollars Melbourne Sydney basis. Shall we accept? Answer quickly."

I may say in parenthesis here, your Honor, that the rate which the Ford Motor Co. agreed to pay to W. R. Grace & Co. for this "Cacicue" shipment was $47.50. In this agreement W. R. Grace & Co. are told:

"Norton now offer rate forty dollars, Melbourne Sydney basis; shall we accept? Answer quickly."

"You will observe from this how the situation is in the East, and that there is apparently some space to be had at somewhat lower quotation than our contract on the 'Cacicue.' It is very hard for our Canada factory to turn down an offer of this

character, and the misunderstanding regarding contract which we mailed to them covering 6200 tons which they advised they did not receive is probably the cause of their being unable to fulfill to the extent of 6200.

"We have written our factory requesting immediate information as to the amount of tonnage for Melbourne and Sydney and hope to receive some at an early date.

"Our wire from the factory dated the 8th reads as follows: [86]

"'Have shipped for 'Cacicue' 166 touring, 16 torpedoes, 34 chassis, for Sydney. Last car left factory May 5. Are shipping 252 touring, 42 torpedoes, 30 chassis for Wellington. Will finish shipping Wellington cars on May 11.'

"The approximate measurement of a carload of 12 tourings is 2101 feet. The approximate measurement of a carload of 12 roadsters is 1905 feet, and the chassis we figure about 557 feet, as they naturally are shipped less the body, which in a 12-car shipment measures 1544 feet.

"With these figures you will undoubtedly be able to approximately tell about what tonnage will go to Sydney and Wellington, as their wire above states that the rest of the Wellington shipment moves on May 11.

"FORD MOTOR CO.,
"Traffic Department.
L. C. DAVIS."

On May 16th Mr. Moore and Mr. Carter received

not furnish the 6200 tons, but would furnish only 4084 tons. That information was received through Mr. Davis. Mr. Moore and Mr. Carter protested, and insisted upon the fulfillment of the contract. The first direct communication received by W. R. Grace & Co. from the Canada office was received on May 18th, in a wire reading as follows: I think it will be clearer if I state first that on May 17th a message was sent by W. R. Grace & Co. to Ford Motor Co. of Canada, reading as follows:

"'Cacicue.' Must know immediately number cars each style and total measurement Wellington, also same information Sydney. Please wire fully to-day."

The contract, which was made on February 25, 1916, provided that quantity for each port was to be declared within [87] ten days from date. On May 17 it had not been declared, and that was the reason for sending that telegram.

The answer was received on May 18 from the Ford Sales Department, Ontario, in the form of a telergam reading as follows:

Mr. McCUTCHEN.—What was the date of that?

Mr. HENGSTLER.—It is dated Wednesday, the 17th; it was received by W. R. Grace & Co. on Thursday, the 18th. It reads as follows:

"Sydney 166 touring, 16 torpedoes, 34 chassis, total 763 tons.

"Wellington, 252 tourings, 42 torpedoes, 30 chassis, total 1190 tons.

"Other parts, 328 tourings, 52 torpedoes, 368 chassis, total 2017 tons. Also four carloads parts,

totaling 116 tons. This is complete 'Cacicue' cargo."

On receipt of this telegram, W. R. Grace & Co. sent a message to the Ford Motor Co., at Ford, Ontario, reading as follows:

"Yours 17th 'Cacicue': Please wire quickly what part 2017 tons Wellington and what Sydney. Your wire gives total 4086 tons. Must have full quantity 6200 tons covered your freighting contract February 25th or payment dead freight on quantity not shipped. We regret time now too short us arrange other cargo."

No answer was received to this telegram from the Ford Motor Co. for one week. Thereafter, on May 25, W. R. Grace & Co. mailed a letter to Canada, reading as follows:

"May 25th 1916.

"Ford Motor Co.,

"Ford, Ontario.

"Gentlemen:

"Although a week has elapsed, we are without reply to date to our telegram to you May 18th, as under: [88]

"'Yours 17th 'Cacicue': Please wire quickly what part 2017 tons Wellington and what Sydney. Your wire gives total 4086 tons. Must have full quantity 6200 tons covered your freighting contract February 25th or payment dead freight on quantity not shipped. We regret time now too short us arrange other cargo.'

"We understand from your San Francisco office

gram May 17th as being destined to 'other ports' is all for Sydney discharge. If you have not already done so, will you please confirm this by telegraph? It is understood, of course, that our Bills of Lading on this business apply to Sydney and to Wellington only, and do not cover on-carriage from those ports of discharge to final ports of destination.

"We confirm, as stated in our wire above, that we must have the full quantity of cargo which you have contracted to deliver us for S. S. 'Cacicue' for Wellington and Sydney, that is, 6200 tons of 40 cubic feet each, or in lieu of this amount of cargo the payment of dead freight on any portion of the contract not shipped. The time is too short to enable us to secure other cargo.

"Yours very truly,
"W. R. GRACE & CO."

The answer to this letter was received by W. R. Grace & Co. on June 5, in a letter written by the Ford Motor Co. of Canada, and dated June 1, 1916, and reading as follows:

"Gentlemen:

"We refer to your letter of May 25th.

"You have already had detailed reply to your wire of the 18th mentioned in your letter.

"Permit us to repeat the information we have already [89] given you with reference to the tonnage for the S. S. 'Cacicue' by ports as follows:

| | Cubic Feet | Tons |
|---|---|---|
| Adelaide | 8,323.91 | 208.10 |
| Brisbane | 16,342.79 | 408.57 |
| Fremantle | 10,014.40 | 250.38 |
| Hobart | 3,421.75 | 85.54 |
| Melbourne | 42,301.99 | 1057.55 |
| Sydney | 30,455.25 | 761.38 |
| Wellington | 47,503.12 | 1187.58 |
| Parts (4 carload) | 4,622.00 | 116.00 |
| Total | 162, 985.21 | 4075.00 |

"In addition, we have effected an arrangement with the Union Steamship Company to transfer to you 1500 tons of the tonnage now on the coast originally contemplated to go forward by Union Steamships.

"We understand that you have let 524 tons additional, making 6099 tons all told out of the 6200 tons allotted to us.

"This letter and the above arrangement is without prejudice to our rights to contend that any engagement purporting to have been entered into on our behalf has not been carried out by yourselves in that such an engagement calls for June loading, which in the parlance must necessarily mean June shipping, whereas we understand the steamer 'Cacicue' will not leave until about the 10th of July.

"We have been advised by Mr. Davis, Traffic Manager for Ford Motor Co., San Francisco, that the S. S. 'Cacicue' would leave on June 24th, and

Our plans were all laid with this in view, and your failing date of July 10th has materially disturbed them. [90]

"We wish it therefore definitely understood that if by reason of the above and other circumstances our plans for supplying 6200 tons for this vessel do not carry through, we do not consider our obligation binding; in fact, we have so stated to Mr. Davis in all of our correspondence to him, and we presume he has given you ample notice to this effect.

"Yours very truly,

"FORD MOTOR CO., OF CANADA, LTD.,

"PRITCHARD, Sales Department."

We expect to show to your Honor that the last cars with automobiles for this shipment left Walkerville on May 29th, and that it would have been impossible for those cars to arrive in time for any June 14th or June 24th sailing, or even probably for any June sailing.

We expect to show that on June 9th the Ford Motor Co. of Canada, Ltd., sent a telegram to the Ford Motor Co. of San Francisco, a copy of which was handed to W. R. Grace & Co., and which reads as follows:

"Ford, Ontario, June 9, 1916.

"Ford Motor Co., City:

"Owing congestion large quantity cars arriving Australia at one time may be necessary to cut down 'Cacicue' cargo by Sydney, Brisbane and Melbourne cars and ship these later. Stop. If this is done can you arrange storage these cars Frisco or will free storage apply. Stop. Do not load any cars

'Cacicue' unless Grace agree that their default has voided any alleged contract, and that 4600 tons less what may be held as above will be loaded at $47.50 per ton and this cargo will not be held for freight for the balance. Stop. Without prejudice to this position, our connections here can likely supply 'Cacicue' with other cargo at $35.

"FORD MOTOR CO. OF CANADA, LTD."

[91]

This telegram was followed the day after, on June 10th, by another telegram from the Ford Motor Co., Ltd., of Canada, addressed to Ford Motor Co. of this city, a copy of which was handed to W. R. Grace & Co., and which reads as follows:

"Ford, Ontario, June 10, 1916.

"Ford Motor Co., City.

"Our wire ninth have decided to not hold up shipments to Sydney, Brisbane, Melbourne. Stop. Will load 4600 tons all told provided Grace agree this is in fulfillment of any contract and will not hold what loaded for entire freight.

"FORD MOTOR CO., LTD., OF CANADA."

The next communication received in connection with this matter was dated June 14, 1916, and received on June 23, 1916, and which reads as follows:

"Ford, Ontario, 14, 1916.

"Messrs. W. R. Grace & Co.,

"332 Pine Street,

"San Francisco, Calif.

"Gentlemen: We refer to your letter of June 6th.

"Any arrangements that you have made for 6200

tons were effected through Ford Motor Co. of San Francisco, which arrangements we do not and never have considered binding upon this company, and which information we have previously given you and now repeat.

"We have forwarded 4075 odd tons of cargo for your S. S. 'Cacicue' at an ocean freight rate of $47.50. This is the entire cargo that we will forward for this vessel, and is the cargo that you have been informed from time to time would be forwarded for this vessel. If you wish to accept this cargo, you are at liberty to do so on these terms. If you take the attitude that there is a contract binding upon this company for 6200 tons space, and attempt to hold this 4075 tons cargo for freight for 6200 tons at the above rate, we will decline [92] to load any of the cargo whatever.

"It is not necessary for us to go into details for the reasons moving us. You have misunderstood our previous letter upon this subject. That letter was designed to simply show in an argumentative way that there had been a contract for 6200 tons binding upon this company, which has never been admitted, but has always been denied, such contract was inoperative by reason of the fact that your S. S. 'Cacicue' has already taken out a clearance for July 5th instead of loading and clearing in June.

"Our shipments of the 4075-ton quantity on the basis outlined above will be ready and alongside

your steamer on June 27th, as indicated by you.

"Yours very truly,

"FORD MOTOR CO. OF CANADA, LTD.,

"PRITCHARD,

"Sales Department."

We expect to show to your Honor that on June 22, 1916, Mr. L. C. Davis wrote a letter to the Southern Pacific Company, which carried these automobiles to San Francisco for this shipment, writing the letter on behalf of the Ford Motor Co. of Canada, reading as follows:

"San Francisco, June 22, 1916.

"Mr. W. J. Hardy,

"Care Southern Pacific Company,

"Fourth & Berry Streets, City.

"Dear Sir:

"Attention Mr. Frank Renz, Steamer Clerk.

"Confirming our telephone conversation of recent date:

"Until you are authorized to do so, please do not under any circumstances deliver any of the cargo at present on hand booked steamer 'Cacicue' to W. R. Grace & Co.

"FORD MOTOR CO.

"TRAFFIC DEPARTMENT,

"L. C. DAVIS." [93]

Under date of June 24, 1916, Mr. Davis wrote and sent the following letter to W. R. Grace & Co.:

"FORD MOTOR CO.,
"Automobile Manufacturers,
"San Francisco.

"W. R. Grace & Co.,
"332 Pine Street,
"San Francisco, Calif.

"Gentlemen:

"Attention H. E. Moore, Traffic Manager.

"We are in receipt of advice from our Ford Ontario factory in which they request that we inform you that 4075 odd tons is the full cargo for the steamer 'Cacicue,' and that they recognize no contract binding upon them to forward 6200 tons on this vessel. Also that unless the 4075 tons is taken on this understanding and not subject to freight for 6200 tons, they request that we withhold loading any of this cargo.

"FORD MOTOR CO.
"L. C. DAVIS,
"Traffic Department."

On June 27, 1916, the libel in this case was filed, and the automobiles attached by writ of foreign attachment. To minimize the damages in this case, W. R. Grace & Co. afterwards accepted 4075 tons of the automobiles offered to them at the rate of $35, and in addition to that 542 Peabody machines, which was an acceptance of 4075 tons instead of 6200 tons which were contracted for. This was made for the purpose of minimizing the damages. That means, as translated into terms of cars, that instead of sending 130 cars, or about 130 cars, the Ford Company forwarded only 85 cars; and in-

stead of delivering about 3270 packages only 2150 packages were delivered. All of that portion of the cargo which was delivered was accepted at the cheaper rate, that is, at the lower rate of $35, for the purpose of minimizing the damages. It was carried by the "Cacicue" to Sydney, and Wellington, [94] and there delivered.

Your Honor will note that the main dates are February 25, 1916, when the contract was made; that everything went along regularly and smoothly until May 13, the libelant thinking that the contract was in force, and it had no intimation that the other side took a different view of it; that on May 13 a lower freight was offered in the East for this class of cargo, and that then the telegram came from the Eastern office to Mr. Davis, advising him of that. That furnished the first motive for rejecting the contract.

The first objection to the contract was stated by the defendant on May 13th; there appears some intimation that Mr. Davis' contract, when it was forwarded by him from San Francisco to Ontario was lost in the mail. Nothing was said about any other objection then.

On June 1, in the letter which I read to your Honor, a second and different objection appeared, namely, the objection that this contract called for a June loading, and that W. R. Grace & Co. had broken the contract because they were not going in the future to make any June loading.

On May 14 an entirely new objection creeps out, a third objection; in one of the letters, as your

Honor noticed, it is stated that Mr. Davis is not authorized to make the contract, and that the contract is not binding on the company. The answer to the libel admits that a contract was made. So that this position is not taken by the respondent at the present time.

The libel in the case recites that W. R. Grace & Co. is a corporation; that is admitted. And that the Ford Motor Co. of Canada is a corporation, and that is admitted. [95]

In paragraph III, the fact of the contract is stated by libelant, but it is denied by respondent that it is correctly stated. We are willing, of course, to abide by the contract itself. The contract itself, the whole contract, reads as follows:

Mr. McCUTCHEN.—Doctor Hengstler, in that respect, I suppose the copy which is set up by us as an exhibit in the defendant's answer is a correct copy of the contract, is it not?

Mr. HENGSTLER.—I have not the answer before me.

Mr. McCUTCHEN.—Well, you can determine that later on. You do not in your libel suggest that there was any provision in the contract for June loading; I take it that that was an inadvertence in pleading the effect of the writing which had been signed by the parties.

Mr. HENGSTLER.—We merely intended to state the legal effect. That is a matter of law, anyway.

I will introduce in evidence the original contract. The whole contract reads as follows:

"San Francisco, February 25th, 1916.

"Ford Motor Company,

"San Francisco, Cal.

"Gentlemen:

"Attention Mr. L. C. Davis.

"We confirm freighting engagement as follows:

"COMMODITY: 6200 tons (40 cubic feet each) automobiles and parts, in packages.

"RATE: $47.50 per cubic feet measurement from San Francisco to Wellington, New Zealand, and/or Sydney, Australia, freight prepaid; quantity for each port to be declared within ten days from date.

"SHIPMENT: Per American S. S. 'Cacaque' June loading; when vessel is closer at hand, will advise you more definitely as to exact loading date. [96]

"DELIVERY: To be delivered alongside steamer at San Francisco as fast as vessel can load, otherwise shippers to pay demurrage at rate of $3,000.00 per day.

"Total shipment weighs approximately 1550 tons (2240 pounds each) measuring about four to one.

"Yours very truly,

"W. R. GRACE & CO.,

"(Sgd.) H. E. MOORE,

"Traffic Manager.

"Accepted.

"(Sgd.) FORD MOTOR CO. OF CANADA, LTD.

"By L. C. DAVIS."

Mr. McCUTCHEN.—Are you offering that now?

Mr. HENGSTLER.—No, I am not offering it now, I just want to hand it to the Court.

Mr. WILLIAMSON.—It is set forth in the answer, a copy is set forth in the answer.

Mr. McCUTCHEN.—I do not object to this, Doctor. I understand, your Honor, that counsel is now making his opening statement.

Mr. HENGSTLER.—No, I got through with the opening statement; I am now on the pleadings.

Mr. McCUTCHEN.—Very well. We don't care for it, Doctor, we are familiar with it.

Mr. HENGSTLER.—It is a full copy, except that Mr. Davis' signature is not there. I merely hand the copy to the Court for convenience, so that your Honor can get an idea of what the contract is. I will offer the original in evidence later on if it is desired by the other side.

Paragraph IV of the libel reads as follows:

"That thereafter, and on or about the 5th day of June, 1916, libelant advised respondent, Ford Motor Co. of Canada, [97] Ltd., that as to the loading date aforesaid said steamship 'Cacicue' would be ready for loading said 6200 tons automobiles and parts in packages, as per said contract February 25, 1916, on the 27th day of June, 1916."

The answer to that allegation is:

"Claimant and respondent denies the allegations of article IV of said libel, and in that behalf alleges that prior to the 1st day of June, 1916, and at divers times, libelant gave claimant and respondent notice of earlier loading dates in the month of June, and

thereafter, and on or about the 6th day of June, 1916, gave to the Ford Motor Co. of San Francisco, California, that certain notice set forth in a copy thereof attached hereto, marked Exhibit "B," and hereby made a part of this answer, with the same force and effect as though pleaded at length herein."

Nothing was intended in the allegation of Article IV except to state the legal effect of Exhibit "B," and we are willing that Exhibit "B" should be substituted for the allegation of Article IV.

The fifth article of the libel is:

"That thereafter, and on or about the 23d and 24th days of June, 1916, about 1094 packages, consigned to the order of respondent, of automobiles and parts and packages, of wholly different description and bulk than required by and specified in said contract of February 25, 1916, were deposited by respondent, Ford Motor Co. of Canada, on Pier 26, in the city and county of San Francisco, on the wharf of libelant, alongside of which said steamship 'Cacicue' was to dock; and that thereafter, on the 27th day of June, 1916, said steamship 'Cacicue' arrived alongside of said dock and was in readiness to load said cargo [98] described and specified in said contract of February 25, 1916."

That is denied.

Mr. McCUTCHEN.—Doctor, for our enlightenment, does that mean that you were ready to load the 1100 packages that were then on the wharf, or that you were not ready to load those?

Mr. HENGSTLER.—We were not ready to load

the 1100 packages, because you did not deliver them to us.

The next allegation of the libel is that on the 23d and the 26th days of June, 1916, said respondent, Ford Motor Co. of Canada, Ltd., in writing, expressly refused to perform said contract of February 25, 1916, and advised and informed libelant that said respondent, Ford Motor Co. of Canada, Ltd., had forwarded 4075 odd tons of cargo for said steamship "Cacicue," at an ocean freight rate of $47.50; that said amount of 4075 odd tons was the entire cargo that said respondent, Ford Motor Co. of Canada, Ltd., would forward for said steamship, and that if libelant should attempt to hold said 4075 tons for freight for 6200 tons at said rate, said respondent, Ford Motor Co. of Canada, Ltd., would decline to load any of said cargo whatever.

That is denied. We have to prove that. For the purpose of proving the facts, I will now call Mr. Moore to the stand. [99]

**Testimony of Harvey E. Moore, for Libelant.**

HARVEY E. MOORE, called for the libelant, sworn.

Mr. HENGSTLER.—Q. Mr. Moore, what is your business?

A. Present business?

Q. Yes. A. I am in the exporting business.

Q. What is your residence?

A. Chicago, Illinois.

Q. What was your business in February, 1916?

(Testimony of Harvey E. Moore.)

A. I was traffic manager for the San Francisco house of W. R. Grace & Co.

Q. You came from Chicago especially for the purpose of testifying in this case, did you not?

A. I did.

Q. Mr. Moore, what were your dealings with Mr. L. C. Davis, of the Ford Motor Co., during the month of February, 1916, with reference to a shipment of automobiles to Australia? How did those dealings originate?

Mr. McCUTCHEN.—It might be well, perhaps, to have in mind the fact that Mr. Davis was associated with the Ford Motor Co. at San Francisco, an American corporation. The respondent here is the Ford Motor Co. of Canada, Ltd., a Canadian or British corporation. I simply suggest that so that it may be borne in mind.

Mr. HENGSTLER.—You do not deny that Mr. Davis, of the Ford Motor Co. of San Francisco was acting for the Ford Motor Co. of Canada in this case, do you?

Mr. McCUTCHEN.—We do not deny that Mr. Davis acted as the agent of the Ford Motor Co. of Canada in the making of this contract; the making of the contract is admitted. I am not making any objection to your question. I simpy thought it was wise to interject that comment here.

A. Some time in February, about the middle of the month, I believe, Mr. Meyers, then Commercial Agent of the Southern [100] Pacific Railway, of San Francisco, brought a gentleman to my office in

(Testimony of Harvey E. Moore.)

the offices of W. R. Grace & Co., and introduced him to me as Mr. L. C. Davis, of the Ford Motor Co. He stated that Mr. Davis had a quantity of automobiles for freight to New Zealand and/or Sydney, and wanted to know what we could do toward lifting them from this port. It was brought out during the conversation that there were about 6200 measurement tons of these automobiles, which would weigh approximately 1,550 tons of 2240 pounds each dead weight. We had some conversation with reference to the rates then effective from San Francisco to the South Seas, and it is my recollection that Mr. Davis stated that he did not believe his company could afford to pay the going rate then of about $55 a ton on this shipment.

Mr. HENGSTLER.—Q. What was the rate which was then agreed upon between you and Mr. Davis?

Mr. McCUTCHEN.—One moment. Isn't that set forth in the contract?

Mr. HENGSTLER.—Yes.

A. There was some conversation covering that, and Mr. Davis finally agreed that they could afford to pay $47.50.

Mr. McCUTCHEN.—We have no objection to that.

Mr. HENGSTLER.—Q. Did Mr. Davis say anything about the time when these automobiles would be sent out here?

A. My recollection is that he said that the entire

(Testimony of Harvey E. Moore.)

shipment could move from the factory during the month of May, 1915.

Q. What were the conditions of the shipping business at the time with reference to finding a vessel for the purpose of carrying cargo of that nature?

A. Vessels were very scarce and rates were high at that time on account of the [101] scarcity.

Q. The rates were high at that time?

A. They were.

Q. What was that due to?

A. The scarcity of tonnage, vessel tonnage.

Q. What was the scarcity of tonnage due to?

A. The European war, no doubt.

Q. What did you say to Mr. Davis in response to his inquiry about a ship to carry this tonnage?

A. I told him that I did not know of any vessel we might have at that moment that could be assigned to that business, but that I would take the matter up with my superiors, and, if possible, we would detach a boat from our other service for this Australian-New Zealand cargo.

Q. Was anything in that conversation mentioned with reference to Mr. Davis' authority to act for the Ford Motor Co. in Canada?

A. I asked Mr. Davis particularly whether he was authorized to make such a contract in the event I could find tonnage for the business, and he said he was. He told me he had either a telegram or a letter, I don't remember which, but that he was fully authorized to proceed.

Q. Was anything mentioned at the meeting with

(Testimony of Harvey E. Moore.)

reference to the mode of packing these automobiles for export?

A. My recollection is that they had been experimenting with different packages for export, and they had succeeded—

Mr. McCUTCHEN.—One moment: The question is whether there was any conversation with reference to that matter, and I am inclined to think the question is leading, but I do not object to it on that ground.

The COURT.—He is giving his recollection of this.

Mr. McCUTCHEN.—I beg your Honor's pardon?

The COURT.—I understand he is giving his recollection of [102] that conversation.

A. And that they had succeeded in bringing it down to approximately to four to one.

Mr. HENGSTLER.—Q. What does that mean, will you kindly explain to the Court?

A. It means one ton of dead weight or 2240 pounds would measure approximately 160 cubic feet.

Q. That one ton of dead weight placed into the vessel would consume a space of how many cubic feet?

A. 160 feet, four measurement tons.

Q. 160 cubic feet? A. Yes.

The COURT.—That is because of the bulk of the articles compared with their weights? A. Yes.

Mr. HENGSTLER.—Q. Was any particular

(Testimony of Harvey E. Moore.)

steamer mentioned at the first interview which you had with Mr. Davis?

A. I think I pointed, I am sure I pointed out to Mr. Davis our map on the wall, there, which gave the position of practically our entire fleet. Whether I said at that particular moment that we could consider the "Cacicue" in connection with this shipment, I am not positive.

Q. What did you say to Mr. Davis with reference to your willingness to find a steamer to move this cargo?

A. I invited Mr. Davis and accompanied him into Mr. Carter's office, to discuss the matter with Mr. Carter, our submanager.

Q. What happened in Mr. Carter's office with reference to that—not details, but with reference to finding a vessel?

A. Mr. Carter was interested in the proposition, and after discussing it he or I, or both of us, told Mr. Davis that we would let him know later what could be done.

Q. What did your office, and by that I mean you or Mr. Carter, do with reference to this transaction, to this offer of the [103] Ford people?

A. We considered it—

Mr. McCUTCHEN.—I understand that is what did they do so far as the respondent is concerned?

Mr. HENGSTLER.—No, what W. R. Grace & Co. did with reference to this offer which was made to them by the Ford Motor Co.

Mr. McCUTCHEN.—I don't think we would be

(Testimony of Harvey E. Moore.)

bound by any conversation between Carter and this witness in the absence of Mr. Davis.

The COURT.—No; just so far as those were communicated to Mr. Davis. I understand you and Mr. Carter conferred about what ships you might have, and where they were, and what ones might be allotted to this business. A. Yes.

Q. As a result of that conversation, what did you communicate to Mr. Davis?

A. Several days later we communicated with Mr. Davis and told him that we had been able to locate a vessel.

Mr. HENGSTLER.—Q. What vessel did you finally tell him appropriate for the shipment?

A. The steamer "Cacicue."

Q. Did you tell Mr. Davis the particulars about the steamer "Cacicue"? A. As regards what?

The COURT.—As to when she would get here, what trip she had to make? A. Yes.

Q. With regard to her engagements? A. Yes.

Mr. HENGSTLER.—Q. What did you tell him?

A. I told him that the "Cacicue" was on a voyage from the Atlantic to San Francisco, partially loaded with coffee for discharge at San Francisco; that she was to stop at a nitrate port on the West Coast of South America, and take on 5000 tons of nitrate for Vladivostok; that she was to take on bunkers, oil fuel, somewhere between there and San Francisco, that is, between the nitrate port and San Francisco; that she would discharge [104] her coffee at San Francisco, fill up with cotton, and ma-

(Testimony of Harvey E. Moore.)

chinery, and other miscellaneous cargo from San Francisco to Vladivostok, that she would discharge at Vladivostok and return to San Francisco via one or more Oriental ports, and after she discharged at San Francisco any cargo which she might pick up on the return voyage, she would be made ready for this automobile cargo. At this time, we figured, from the speed she was making and other conditions, that she would be—

Mr. McCUTCHEN.—Do I understand that this was in the presence of Mr. Davis, that you figured on the speed?

A. I am relating what I told Mr. Davis, that she would be due in San Francisco for March loading for Vladivostok, for late March loading for Vladivostok, and that given a favorable voyage her probable date for returning for loading at San Francisco for these automobiles would be some time in June.

Mr. HENGSTLER.—Q. Did Mr. Davis at any time during these negotiations mention any particular time when the shipment should take place?

A. He mentioned the shipment would be made ready for shipment from the factory in May; but no stress was placed upon the fact—

Mr. McCUTCHEN.—I object to that as a characterization of the conversation. What is wanted is the conversation.

The COURT.—He can state it, if he can.

A. Mr. Davis did not impress upon me that June shipment from San Francisco was necessary. It is

(Testimony of Harvey E. Moore.)

my recollection that they had been trying very hard to find space for this particular lot of freight, and that they would very much appreciate anything which could be done by us to move it from San Francisco within a reasonable time after it arrived here.

Mr. HENGSTLER.—Q. Did you, or anybody on behalf of W. R. Grace & Co. in your presence, ever tell Mr. Davis that the [105] "Cacicue" was certain to arrive in San Francisco during the month of June, or at any particular time?

Mr. McCUTCHEN.—One moment; I think it would be better, if your Honor please, if the witness were asked for the conversation.

The COURT.—It would, but this is a long time ago, and I think the question is not an unfair one.

A. I did not. As a matter of fact, it would be impossible at that time, with the vessel's commitments ahead of her, to guarantee that she would arrive here in June.

The COURT.—I understood you to state, Mr. Moore, that what you said to him was, given a favorable voyage to Vladivostok and return she ought to be here to load sometime in June.

A. Yes.

Mr. McCUTCHEN.—I think the last statement of the witness ought to go out, that it would be impossible.

The COURT.—Unless he told Mr. Davis that.

Mr. McCUTCHEN.—Yes.

(Testimony of Harvey E. Moore.)

The COURT.—Q. Did you tell Mr. Davis that, that it would be impossible to figure definitely?

A. Yes.

The COURT.—Let it stand.

Mr. HENGSTLER.—Q. Had the "Cacicue" ever been used on any line of W. R. Grace & Co. on a schedule?

Mr. McCUTCHEN.—I object to that as irrelevant and immaterial.

The COURT.—The objection will be sustained.

Mr. HENGSTLER.—Q. Have you any recollection, Mr. Moore, as to the time when Mr. Davis was definitely advised that the "Cacicue" would be assigned for this particular business?

A. It would have been February 25 or a day or two previous to that. [106]

Q. And then you drew up this contract together, did you, on February 25?

A. That is the date of the contract, yes.

The COURT.—You prepared it?

A. I prepared it, and it was accepted by Mr. Davis.

Mr. HENGSTLER.—Have you the original of that?

Mr. McCUTCHEN.—I don't think we have the original, but we will consent that the copy may be substituted. There is no issue between us as to what the language of it was.

The COURT.—You mean this contract letter?

Mr. HENGSTLER.—Yes.

Mr. McCUTCHEN.—A copy of that is set up as

(Testimony of Harvey E. Moore.)

an exhibit to the answer; there is no issue between us as to what the language of it was.

The COURT.—All right.

Mr. McCUTCHEN.—Might I suggest, possibly your purpose would be accomplished by simply an admission that the copy of the contract set up in the answer is a correct copy, and that would avoid the necessity of offering it.

Mr. HENGSTLER.—I would like to examine that copy.

Mr. McCUTCHEN.—If you have not done that, I will not ask it.

Mr. HENGSTLER.—I would like to see whether it is an exact copy in the answer before I make the admission. I think very likely it is.

Mr. McCUTCHEN.—It is set up as Exhibit "A" to the answer.

Mr. HENGSTLER.—I understand there is no objection that in lieu of the original this copy which is handed to me now by Mr. Williamson is a correct copy of the contract, and may be offered in evidence.

Mr. McCUTCHEN.—No objection. [107]

The COURT.—The copy of the answer is in accord with the copy you furnished me, except the initials "H. G. M." are signed instead of H. G. Moore, as set out in the answer, and that this is not signed at all—but the body of the contract is the same?

Mr. HENGSTLER.—There is no objection on the part of the other side that this copy be offered in evidence in lieu of the original.

The COURT.—All right.

(Testimony of Harvey E. Moore.)

Mr. HENGSTLER.—I would prefer it, because it corresponds exactly with the original, whereas the copy of the answer does not.

Mr. WILLIAMSON.—Will you furnish me a substitute copy for my record?

Mr. HENGSTLER.—Yes, I will give you this one.

(The contract was marked Libelant's Exhibit "A.")

Q. If you remember, Mr. Moore, what was the first meeting with Mr. Davis after the contract was made, and what was it about?

A. Well, I saw Mr. Davis at rather frequent intervals right along at that time, and I cannot tell you the first time I saw him after the contract was signed.

Q. Mr. Moore, I hand you a file marked "Ford Contract"; will you kindly identify it and tell the Court what this file is?

A. This is the file that I started on this contract.

The COURT.—Grace & Co.'s file? A. Yes.

Mr. HENGSTLER.—Q. That is Grace & Co.'s file with reference to this transaction, and was made up by yourself, was it not?

A. Very largely. The first part of it was, certainly.

Q. Referring to this file, can you refresh your memory and tell the Court whether there were any transactions with Mr. [108] L. C. Davis in connection with this matter after the contract was made?

(Testimony of Harvey E. Moore.)

A. There is a letter here signed by Mr. Davis, dated March 4, directed for my attention, handing a copy of the packages—handing me a memorandum of the form of the packages that were to be shipped in this cargo. This memorandum gives the length, width, height, gross and net weight of these packages. This was to establish the form by which the shipment was to be made.

Mr. McCUTCHEN.—I think the most orderly course would be to offer that letter in evidence, instead of having the witness' characterization of the letter, or his statement of the purpose of it.

Mr. HENGSTLER.—I do not care to have the letter in evidence. It is immaterial for this purpose. You can read the letter, and if you want it in evidence you can put it in. It is mere detail, this particular letter.

Q. When did you receive the first information—

Mr. McCUTCHEN.—Let me see that letter.

Mr. HENGSTLER.—It is only a detail with reference to the mode of packing.

Q. Mr. Moore, by referring to this file, can you tell the Court when you received the first information concerning a shortage in the shipment intended by the Ford Motor Co.?

Mr. McCUTCHEN.—Do I understand that that question calls for an inquiry, or calls for information as to whether he received that in the form of a letter or a telegram, or some written communication?

Mr. HENGSTLER.—No, at what time did he receive the first information in any form, either in

(Testimony of Harvey E. Moore.)

the form of a letter, or a telegram, or verbally from Mr. Davis, that less than 6200 tons would be shipped. [109]

A. Here is a letter from Mr. L. C. Davis, dated May 13, received in our office on May 15.

Mr. McCUTCHEN.—I do not want to be technical, but is that an answer to the question, that it was on the 15th of May you received first that information?

The COURT.—Is that the first information you received?

A. My recollection is that is the first information I received.

Mr. HENGSTLER.—Q. On May 13 you received the first information?

A. May 15. That letter was received May 15; it was written May 13.

Q. On May 15, in the letter dated May 13, you received the first information that less than the full amount was intended to be delivered: Is that correct? A. Yes.

Mr. HENGSTLER.—Do you want to see that letter?

Mr. McCUTCHEN.—Yes.

Mr. HENGSTLER.—Q. What did you do when the information was received, Mr. Moore?

A. We wired the Ford Motor Co. at Canada telling them that—

Mr. McCUTCHEN.—One moment; I submit that we ought to have the telegram.

Mr. HENGSTLER.—Yes.

(Testimony of Harvey E. Moore.)

Q. What wire did you send to the Ford Co. of Canada?

A. We wired them on May 17: "'Cacicue.' Must know immediately number cars each style and total measurement Wellington. Also same information Sydney. Please wire fully today."

Q. Did you receive an answer to this wire?

A. The answer was received in our office May 18.

Q. What was the answer received?

A. "Sydney 166 touring 16 torpedoes, 34 chassis, total 763 tons.

"Wellington 252 tourings, 42 torpedoes, 30 chassis, total [110] 1190 tons.

"Other ports, 328 tourings, 52 torpedoes, 368 chassis, total 2017 tons. Also four carloads parts totalling 116 tons. This is complete 'Cacicue' cargo."

Q. What did you do upon receipt of this telegram?

A. I tabulated it in pencil on the bottom of this telegram here showing the full total of the cargo then offered.

Mr. McCUTCHEN.—I suppose counsel is calling for some response to that.

Mr. HENGSTLER.—He gave me some response.

The COURT.—He said he tabulated the total. Then what did you do?

A. The full total of these amounted to 4086 tons. On May 18 we telegraphed the Ford Motor Co., Ford, Ontario: "Yours seventeenth 'Cacicue' Please wire quickly what part two thousand and

(Testimony of Harvey E. Moore.)

seventeen tons Wellington and what Sydney Your wire gives total four thousand eighty-six tons Must have full quantity sixty-two hundred tons covered your freighting contract February twenty-fifth or payment dead freight on quantity not shipped We regret time now too short us arrange other cargo."

Mr. HENGSTLER.—Q. What happened next?

A. We waited a week for reply, and not receiving any we wrote them on May 25. Do you wish me to read the letter?

Mr. HENGSTLER.—With your Honor's consent I would like to read the whole matter into the record, as W. R. Grace & Co. would like to keep their file intact.

The COURT.—All right.

A. May 25, 1916. Ford Motor Company, Ford, Ontario.

"Gentlemen: Although a week has elapsed we are without reply to date to our telegram to you May 18th, as [111] under:

"'Yours 17th Cacicue. Please wire quickly what part two thousand and seventeen tons Wellington and what Sydney. Your wire gives total four thousand eighty-six tons. Must have full quantity sixty-two hundred tons covered your freighting contract February twenty-fifth or payment dead freight on quantity not shipped. We regret time now too short us arrange other cargo.'

"We understand from your San Francisco office that the 2017 tons which you mention in your telegram May 17th as being destined to 'other ports'

(Testimony of Harvey E. Moore.)

is all for Sydney discharge. If you have not already done so, will you please confirm this by telegraph? It is understood, of course, that our bills of lading on this business apply to Sydney and to Wellington only and do not cover on-carriage from those ports of discharge to final ports of destination.

"We confirm, as stated in our wire above, that we must have the full quantity of cargo which you have contracted to deliver us for S. S. 'Cacicue' for Wellington and Sydney, that is, 6200 tons of 40 cubic feet each, or in lieu of this amount of cargo the payment of 'dead freight' on any portion of the contract not shipped. The time is too short to enable us to secure other cargo.

"Yours very truly,

"W. R. GRACE & CO.,

"Traffic Manager."

Q. Did you have any communication with Mr. Davis about that time?

A. We had a number of conversations over the matter, I could not give you the date, but, naturally, we were very much disturbed, and I talked to Mr. Davis about it several times.

Q. When did you receive a communication from the Ford Motor [112] Co. after May 25, the first communication after May 25?

A. They replied to that letter under date of June 1, received in our office on June 5.

Q. What does this letter state?

A. "Ford, Ontario, 6–1–1916.

"Messrs. W. R. Grace & Co.,

"332 Pine Street,

"San Francisco, Calif.

"Gentlemen"—

Do you wish this printed matter read into the record, printed on their letterhead?

Mr. HENGSTLER.—Do you consent to his leaving it out?

Mr. McCUTCHEN.—We just want the letter.

A. "We refer to your letter of May 25th.

"You have already had detailed reply to your wire of the 18th mentioned in your letter.

"Permit us to repeat the information we have already given you with reference to the tonnage for the S. S. 'Cacicue' by ports as follows:

| | Cubic feet. | Tons. |
|---|---|---|
| Adelaide | 8,323.91 | 208.10 |
| Brisbane | 16,342.79 | 408.57 |
| Fremantle | 10,014.40 | 250.38 |
| Hobart | 3,421.75 | 85.54 |
| Melbourne | 42,301.99 | 1057.55 |
| Sydney | 30,455.25 | 761.38 |
| Wellington | 47,503.12 | 1187.58 |
| Parts (4 carload) | 4,622.00 | 116.00 |
| Total | 162,985.21 | 4075.00 |

"In addition, we have effected an arrangement with the Union Steamship Company to transfer to you 1500 tons of the tonnage now on the coast originally contemplated to go forward by Union steamships.

(Testimony of Harvey E. Moore.)

"We understand that you have let 524 tons additional, making 6099 tons all told out of the 6200 tons allotted to us.

"This letter and the above arrangement is without prejudice to our rights to contend that any engagement purporting to have been entered into on our behalf, has not been carried [113] out by yourselves, in that, such an engagement calls for June loading, which, in the parlance, must necessarily mean June shipping, whereas we understand the steamer 'Cacicue' will not leave until about the 10th of July.

"We have been advised by Mr. Davis, traffic manager for Ford Motor Co., San Francisco, that the S. S. 'Cacicue' would leave on June 24th and again advised that it would leave on June 14th. Our plans were all laid with this in view, and your sailing date of July 10th has materially disturbed them.

"We wish it, therefore, definitely understood that if by reason of the above and other circumstances, our plans for supplying 6200 tons for this vessel do not carry through, we do not consider our obligation binding; in fact, we have so stated to Mr. Davis in all of our correspondence to him, and we presume he has given you ample notice to this effect.

"Yours very truly,

"FORD MOTOR CO. OF CANADA, LTD.

"(Signed) PRITCHARD, Sales Department.

Mr. McCUTCHEN.—Q. Is there any stamp on that letter?

A. There.

(Testimony of Harvey E. Moore.)

Mr. HENGSTLER.—Q. What answer did you make to it?

A. The letter was answered by Mr. Carter; a copy of Mr. Carter's letter is dated June 6, 1916.

"Ford Motor Co. of Salada, Ltd.,

"Ford, Ontario.

"Gentlemen:

"Referring to your letter of June 1st.

"We are glad to note that you have now arranged to 6099 tons out of the 6200 tons allotted to you, and we hope that you will be able to supply the remaining tonnage."

Mr. McCUTCHEN.—Just a moment. I have no objection to this letter going in, but I understand that the witness [114] was asked for some information that he had. He is now reading a letter which he says was written by Mr. Carter. If he participated with Mr. Carter in the writing of that letter, I have no objection to it.

The COURT.—The question was, what reply was made. If you have no objection to the letter, let us take it in order.

Mr. HENGSTLER.—The other side have the original of that letter, and I asked for the production of it.

Mr. McCUTCHEN.—We do not object on that ground.

The COURT.—All right; let us proceed.

A. (Continuing.) "Referring to your letter of June 1st:

"We are glad to note that you have now ar-

(Testimony of Harvey E. Moore.)

ranged for 6,099 tons out of the 6,200 tons allotted to you, and we hope that you will be able to supply the remaining tonnage.

"We note with surprise your remarks on the subject of June loading, and, of course, do not agree with the contention which you reserve. We certainly cannot understand how, if you were not able to supply the agreed tonnage by a later date, your plans to supply it at an earlier date could have been disturbed and will accomplish our contract in accordance with its terms.

"We enclose copy of our letter of to-day's date to Mr. Davis, of your San Francisco office, from which you will note that shipment must be alongside our vessel on June 27th, ready for loading as fast as ship can receive in accordance with our contract of February 25th.

"Yours very truly,
"W. R. GRACE & CO.,
"Submanager."

Mr. HENGSTLER.—Q. What is the next communication which [115] you received?

A. A letter from the Ford Motor Co., Ford, Ontario, dated June 14, 1916, received in our office June 23d.

"Messrs. W. R. Grace & Co.,
"332 Pine Street, San Francisco, Calif.

"Gentlemen:

"We refer to your letter of June 6th.

"Any arrangements that you have made for 6200 tons were effected through Ford Motor Co. of San

(Testimony of Harvey E. Moore.)

Francisco, which arrangement we do not, and never have considered binding upon this company, and which information we have previously given you and now repeat.

"We have forwarded 4075 odd tons of cargo for your S.S. 'Cacicue' at an ocean freight of $47.50. This is the entire cargo that we will forward for this vessel, and is the cargo that you have been informed from time to time would be forwarded for this vessel. If you wish to accept this cargo, you are at liberty to do so on these terms. If you take the attitude that there is a contract binding upon this company for 6200 tons of space, and attempt to hold this 4075 tons cargo for freight for 6200 tons at the above rate, we will decline to load any of the cargo whatever.

"It is not necessary for us to go into details for the reasons moving us. You have misunderstood our previous letter upon this subject. That letter was designed to simply show in an argumentative way, that had there been a contract for 6200 tons binding upon this company, which has never been admitted, but has always been denied, such contract was inoperative by reason of the fact, that your S.S. 'Cacicue' has already taken out a clearance for July 5th instead of loading and clearing in June.

"Our shipments of the 4075-ton quantity, on the basis [116] outlined above, will be ready and

(Testimony of Harvey E. Moore.)

alongside your steamer on June 27th, as indicated by you.

"Yours very truly,

"FORD MOTOR CO. OF CANADA, LTD.,

"PRITCHARD,

"Sales Department."

The COURT.—We will meet at two o'clock.

(A recess was here taken until two o'clock P. M.) [117]

AFTERNOON SESSION.

HARVEY E. MOORE, direct examination (resumed).

Mr. HENGSTLER.—Q. The last letter you referred to this morning during your examination was the letter received from the Ford Motor Co. of Canada on June 23, and dated June 14; what communications did you and the Ford Motor Co., either the Ford Motor Co. of Canada, or Mr. Davis' office here in San Francisco, have after June 14, 1916?

A. On June 26th we received a letter from the Ford Motor Co. of San Francisco, dated June 24, 1916, reading as follows:

"W. R. Grace & Co.,

"332 Pine Street, San Francisco.

"Gentlemen:

"Attention H. E. Moore, Traffic Manager.

"We are in receipt of advices from our Ford, Ontario, factory, in which they request that we inform you that four thousand seventy-five (4075) odd tons is the full cargo for the steamer 'Cacicue'

(Testimony of Harvey E. Moore.)

and that they recognize no contract binding upon them to forward six thousand two hundred (6200) tons on this vessel. Also that unless the four thousand seventy-five (4075) tons is taken on this understanding and not subject to freight for six thousand two hundred (6200) tons, they request that we withhold loading any of this cargo.

"FORD MOTOR CO.

"L. C. DAVIS,

"Traffic Department."

Q. What was the next communication after that?

A. We then sent a telegram to the Ford Motor Co. of Canada, Ltd., at Ford, Ontario, dated Monday, June 26, 1916, reading as follows:

"Referring to your contract with us, of date February 25, 1916, wherein you agree to ship 6200 tons 40 cubic feet each [118] of automobiles and parts, in packages, at $47.50 per 40 cubic feet measurement, freight prepaid, since you have informed us, in your letters of the 14th and 24th inst. that you will not deliver to us the 6200 tons which you agreed to deliver, we now have to advise you that we stand strictly upon the contract made with you, and insist upon your fulfillment of the same in every particular. We are, and have always been, ready to perform all of our obligations under said contract. We further advise you that we will take such quantity of automobiles as are delivered to us, and hold you responsible for all damages, including demurrage, which we may ultimately sustain by reason of any breach of said contract. By taking

(Testimony of Harvey E. Moore.)

a smaller quantity of automobiles than the quantity will which you contracted to deliver, we do not accept such smaller quantity as a full satisfaction of the contract of February 25th, but only as the partial satisfaction which it, in fact, is; and by the acceptance of any such smaller quantity, we do not in any way release or waive any claim for damages or demurrage due to your breach of your contract.

"Yours very truly,

"W. R. GRACE & CO.,

"H. E. MOORE,

"Traffic Manager."

On that same day I dictated a letter to the Ford Motor Co. of Canada, Ltd., at Ford, Ontario, reading as follows:

"We have your letter of June 14th, received here June 23d, also letter of June 24th from Ford Motor Co., San Francisco, and confirm our wire to you of to-day's date as follows"—and then follows the telegram which I have just read. Shall I read it again?

The COURT.—No, I do not think it is necessary.

A. (Continuing.) On June 26th I dictated a letter to the Ford [119] Motor Company, 21st and Harrison Streets, City, attention Mr. L. C. Davis, reading as follows:

"Replying to your letter of June 24, we have to-day wired your Ford, Ontario Office, as follows"—and then follows a copy of the same telegram.

Mr. HENGSTLER.—That is all. I have no further questions to ask on direct examination.

(Testimony of Harvey E. Moore.)

Cross-examination.

Mr. McCUTCHEN.—Q. Will you read the introductory portion of that letter of the 26th to the Ford Motor Co. of San Francisco?

A. "Replying to your letter of June 24th, we have to-day wired your Ford, Ontario, office as follows."

Q. When was that letter of June 24th received by you? A. June 26th.

Q. Did you make any other communication to the respondent at or about that time?

A. Written communication?

Q. You sent a telegram and you wrote a letter on the 26th to the Ford Motor Co. of Canada.

A. Yes.

Q. And you wrote a letter to the Ford Motor Co. of San Francisco on the same day? A. Yes.

Q. Both of those letters acknowledged the receipt of the two communications of the 14th of June and the 24th of June, didn't they? A. Yes.

Q. Did you make any other communication to the Ford Motor Co. of Canada on the 26th or immediately following the 26th of June? Didn't you make a communication to them on the 28th of June?

A. Here is a copy of a telegram dated June 28th, sent to the Ford Motor Co. of Canada, Ltd.; is that what you have reference to?

Q. What I wanted was a letter. I will reframe the question. Did [120] you address a letter to the Ford Motor Co., San Francisco, on the 28th of June? I will show you this letter, Mr. Moore; it will refresh your recollection.

(Testimony of Harvey E. Moore.)

A. I don't see any copy of that letter in here.

Q. That is your signature, is it not?

A. Yes, that is my signature; yes, here is the copy of it.

Q. Will you read that letter?

A. "Ford Motor Co., 21st and Harrison Streets, City.

"Gentlemen:

"Attention Mr. L. C. Davis.

"Please take notice that in accordance with our previous advices the steamship 'Cacicue' was ready to load your cargo contracted for on February 25, 1916, on June 27, 1916, at 9:00 P. M. As you have failed to deliver the cargo alongside steamer as fast as vessel can load, demurrage at the rate of $3000 per day commences on the day and at the hour last mentioned. We this morning wired above to your Ford, Ontario, office."

Q. And you did so wire, did you?

A. There is a copy of the telegram in this file, yes.

Q. Did you address a letter to the Ford Motor Co. on the 22d of June?

The COURT.—Let us get the telegram to the Ford Co. at Ontario, first.

A. A telegram dated June 28, 1916.

"Please take notice that in accordance with our previous advices the steamship 'Cacicue' was ready to load your cargo contracted for on February 25, 1916, on June 27, 1916, at 9:00 P. M. As you have failed to deliver the cargo alongside steamer as fast as vessel can load, demurrage at the rate of three

(Testimony of Harvey E. Moore.)

thousand dollars per day commences on the day and at the hour last mentioned."

Mr. McCUTCHEN.—Q. Did you address a communication to the [121] respondent, or to the Ford Co. of San Francisco, on the 22d of June?

A. Yes.

Q. That letter is addressed to the Ford Motor Co. of San Francisco, is it not? A. It is.

Q. And you repeated a copy of it, did you not, to the Ford Motor Co. of Canada, the respondent here? A. Yes, sir.

Q. Is that the letter (showing)? A. It is.

Q. Will you read it, please?

A. "Ford Motor Co., 21st and Harrison Streets, San Francisco, Calif. Gentlemen:" It is dated June 22.

"Supplementary to our letter June 6th advising that S. S. 'Cacicue' would be ready for loading at San Francisco June 27:

"Please note the delivery of 6200 tons automobiles and parts full quantity of your engagement under contract dated February 25 must commence on that date, June 27, and be completed not later than June 29.

"Yours very truly,

"W. R. GRACE & CO."

Q. When did the "Cacicue" reach port here?

A. At which time?

Q. In the month of June, 1916.

A. I have not got the exact date with me.

(Testimony of Harvey E. Moore.)

Q. She reached here on the morning of the 27th of June, didn't she?

A. I have not the date with me.

Q. How long, Mr. Moore, had you been the traffic manager of Grace & Co.?

A. The actual Traffic Manager of the San Francisco house for Grace & Co., I had been at that time, I should say, a little over—well, I am sorry I cannot tell you.

Q. Approximately.

A. I cannot tell you approximately. I was first engaged by Grace & Co. as Traffic Manager of their Atlantic and Pacific service through the Canal. [122]

Q. Where were you located then?

A. First in New York, and afterwards in San Francisco.

Q. How long did that employment continue, that is to say, as Traffic Manager of that department of their business? A. Three years, probably.

Q. And where were you located during that time? You say in New York, and where else?

A. San Francisco.

Q. In New York and San Francisco? A. Yes.

Q. Did you leave that employment to come to the house here as Traffic Manager?

A. When the Canal was blocked down there they suspended the Atlantic and Pacific service, and I continued with this house here as Traffic Manager of the other services.

Q. Would you say that you were traffic manager

(Testimony of Harvey E. Moore.)

here for as much as a couple of years, that is to say, aside from the three years' employment that you have mentioned?

A. No, I was in San Francisco, I think, less than four years altogether.

Q. And during all of that time were you traffic manager? A. Of one service or the other.

Q. Prior to the time that you went into the service of Grace as Traffic Manager for this eastern business or Canal business, had you had any experience as a Traffic Manager for other houses?

A. Not for other houses; I had been in the railway business for many years.

Q. You had been engaged in the transportation business for a great many years, had you?

A. Yes.

Q. And you were quite familiar with it, were you not, in all of its branches and phases?

A. That is a pretty broad statement.

Q. Well, were you generally familiar with the transportation business, both rail and steamer transportation?

A. I so considered [123] myself; yes.

Q. How long had you been in that business before entering the service of Grace & Co.?

A. Some 20 years.

Q. While you were with Grace & Co., was it, or not, your duty to make contracts for the shipment of freight on the vessels which were being operated by Grace & Co.?

A. I was booking cargo for them. Very few of

(Testimony of Harvey E. Moore.)

our freighting contracts were covered by written contracts, they were mostly by exchange of letters.

Q. You understand that a contract may be set forth in letters as well as in a formal instrument that is called a contract, do you not?

A. Probably.

Q. Would it be a correct statement to say that you had been in the habit of drafting letters in which were set forth contracts for shipment during the three or four years that you were at the head of the Traffic Department of Grace & Co.?

A. It would.

Q. So that you were quite familiar with the drafting of such contracts? A. Yes.

Q. You say you do not know when the 'Cacicue' arrived in port here, but you do know the fact that she did arrive in port, do you not?

A. I do know that she arrived, yes.

Q. Were you at the dock when she docked?

A. I was not.

Q. Did your duties require you to go upon the dock when a steamer docked? A. No, sir.

Q. You had nothing to do with that?

A. No, sir.

Q. Who, in Grace & Co., came in contact with the captains when they arrived in port?

A. It would usually be a representative of the Steamer Department.

Q. And who were the representatives of the Steamer Department [124] of Grace & Co. at that time?

(Testimony of Harvey E. Moore.)

A. I am not sure whether it was Mr. Eggers or Mr. Cushing.

Q. In your letter of the 22d of June, you called upon the Ford Motor Company to have its freight upon the dock upon the morning of the 27th, so that the loading could be completed by the evening of the 29th; why did you do that?

A. The letter does not so read.

Q. Possibly I have not stated that accurately, Mr. Moore, but I thought I had. The letter says that loading must commence on that date, June 27th, and be completed not later than June 29th, does it not?

A. My copy does not read so; my copy reads that the delivery must commence at that time.

Q. I think you are right about that. Why was it important that the delivery of freight should be completed by the 29th of June?

A. That letter was undoubtedly written on the strength of some request given me by our steamer or operating department.

Q. Have you any independent recollection of that? A. I have not.

Q. You state in this letter that delivery must commence on the 27th of June; see if you cannot refresh your recollection and tell us whether at that time you knew when the "Cacicue" would berth?

A. I cannot recall it now.

Q. You are quite certain that she was not in port on the 22d, when you wrote the letter, are you not?

A. I could not tell; I do not think she was, but I am not certain.

(Testimony of Harvey E. Moore.)

Q. Was she in port when you wrote the letter of the 26th?

A. Not knowing just when she came in, it is hard for me to say; I do not know.

Q. You will notice that this letter of the 22d expressly says that the "Cacicue" will be ready to load at San Francisco June [125] 27, do you not? A. Yes, I notice that.

Q. Did you not know at that time, Mr. Moore, that the "Cacicue" would not be ready to load on the 27th of June?

A. That was figured out from her position and her schedule—her performance.

Q. That is to say, from her schedule and her performance, you knew that she probably could not arrive here before the morning of the 27th?

A. That was figured as the probable date of her arrival, I think, at that time.

Q. Did you know the condition prevailing in San Francisco at that time with reference to the ability to discharge and load freight on steamers?

A. I don't recall; that is an operating detail that I don't remember.

Q. And you have no recollection now that there was a strike of stevedores prevailing in San Francisco at that time, and that the discharge and loading of the ships of Grace & Co. was very, very much delayed?

A. If that is the fact, I have forgotten it.

Q. You have forgotten, you say?

A. I say if that is the fact, I have forgotten it.

(Testimony of Harvey E. Moore.)

Q. And you have no recollection on that subject now whatsoever? A. I have not.

Mr. HENGSTLER.—I suggest, if your Honor please, that all of this is not cross-examination. Are you making Mr. Moore your own witness?

Mr. McCUTCHEN.—No, I am not making him our own witness. This is practically all set forth in the correspondence which you have offered, or in correspondence of which that was a part.

Mr. HENGSTLER.—Strike of stevedores?

Mr. McCUTCHEN.—No, not strikes of stevdores, but the statement in the letter that they would be ready to load on the [126] 27th. I think, if your Honor please, that when we get along a little further we will show that it is quite germane to the information which was elicited on the direct examination.

Mr. HENGSTLER.—I have not any real objection, even if you should make him your witness, if you desire to do so.

Mr. McCUTCHEN.—No, I am not making him our witness.

Q. Now, going back to the interviews which you had with Mr. Davis, when Mr. Davis first approached you, what did he say he wanted?

A. He wanted to move these automobiles to New Zealand and Australia.

Q. When?

A. Within a reasonable time after they arrived here.

(Testimony of Harvey E. Moore.)

Q. Within a reasonable time, but he did not mention any month? A. No, sir.

Q. You say that he had some letters and telegrams which he showed you in response to your inquiry as to whether or not he had authority to make the contract? A. I don't believe I so testified.

Q. Well, did he show you some letters and telegrams? A. He did not.

Q. And you did not testify—

The COURT.—He testified that Davis told him he had letters and telegrams which authorized him to make the contract.

Mr. McCUTCHEN.—Q. And you did not ask him to exhibit those letters or telegrams to you?

A. He had not them with him.

Q. He did not have them with him? A. No.

Q. Did you tell him at that time that the "Cacicue" would be ready for early June loading?

A. I never made a positive statement of that character, I—

Q. Well, did you tell him that, whether positive, or not? [127]

A. (Continuing.) Nobody would be in a position to make a positive statement about the date of arrival here or elsewhere of a tramp steamer of that character.

Q. And you were not in a position to make any statement when the ship would arrive?

A. It was always indicated by "probable" or "expected arrival."

Q. Did he tell you that he had communicated with

(Testimony of Harvey E. Moore.)

the office in Ontario and had told them that the ship would be ready for early June loading?

A. Not to my recollection.

Q. Did he come back to you afterwards, and before the contract was signed, or shortly after it was signed, and ask you for a date when the ship would sail? A. Not to my recollection.

Q. He might have done that?

A. Well, he may have asked many questions.

Q. And did you not tell him then that she would sail about the 14th of June?

A. Not to my recollection.

Q. When did you figure that the ship would return here, when you talked with Davis?

A. I can only say in a general way, some time in June.

Q. Didn't you tell him about the 13th of June?

A. Not to my recollection.

Q. Did you not follow the ship on the chart and say that she would be ready for loading about the 13th of June?

A. I remember following the ship's course on the map and indicating a probable date of her return to San Francisco on that second voyage.

Q. What was the probable date that you did indicate? A. I don't remember.

Q. Was it the 13th or 14th of June?

A. Not to my recollection; I don't think we could figure down that close. [128]

Q. It may have been?

A. I don't think it was figured down that close.

(Testimony of Harvey E. Moore.)

Q. In those conversations between you and Mr. Davis, was anything said at all about June loading?

A. Probable June loading.

Q. You say you had been in the habit of preparing contracts for shipment of freight for several years; after this conversation between you and Davis, you sat down, yourself, did you not, and without any suggestion from him, and prepared that contract?

A. I don't think he was there when it was written.

Q. Are you sure he was not there when it was written?

A. No, I am not sure that he was not there.

Q. Aren't you sure that the words "June loading" were your language and not Davis' language?

A. I cannot give you a positive answer to that.

Q. You have no present recollection that Mr. Davis participated in the preparation of that contract, have you?

Mr. HENGSTLER.—Do you mean in writing the words?

Mr. McCUTCHEN.—Yes. I am talking about the preparation of it, now, not the execution of it.

A. No, I don't think he was.

Q. You don't think he participated in the preparation of it? A. I don't think so.

Q. You have prepared many times, during your time, have you not, contracts for the shipment of freight which read, "June or July loading," have you not, where the understanding was that the loading might be made in June or in July?

(Testimony of Harvey E. Moore.)

A. I have written some such contracts, yes.

Q. Has it not been your invariable practice, where the understanding between you and the shipper was that the shipment might be made in one month or in the month following, to so expressly [129] state in the contract?

A. When it covered a spread of 60 days I would do that.

Q. Did this contract cover a spread of 60 days?

A. The freight was to be lifted when the "Cacicue" returned to port.

Q. Did the understanding between you and Davis cover a spread of 60 days?

A. I don't know that those words were used.

Q. Did the understanding between you and Davis cover a spread of 60 days; did you have any understanding to that effect?

Mr. HENGSTLER.—Wait a moment, Mr. McCutchen; you don't permit him to finish his answers.

Mr. McCUTCHEN.—Pardon me, finish your answer.

A. (Continuing.) The understanding was that the cargo was to be lifted when the "Cacicue" returned from Vladivostok, and we designated that voyage as her June loading in San Francisco, to distinguish it from her March-April loading, when she left for Vladivostok.

Q. Then it might take place in June, or in any month following June? A. It might.

Q. If, then, the "Cacicue" was not ready to load until August, that contract would have meant

(Testimony of Harvey E. Moore.)

August loading, and not June loading, would it? Do you understand the question? A. I do.

Q. Will you answer it, please?

A. I think it would; yes.

Q. And if she had not been ready to load in August, it would have meant September loading?

A. We probably would have found other tonnage if she was going to be that late.

Q. I am not talking about that; but that would have been your understanding, that if the ship had not been ready to load in August—

Mr. HENGSTLER.—I object to this, if your Honor please, that is a question of law rather than a question of fact.

The COURT.—The objection is overruled. He says the words [130] in there do not mean June loading; we want to find out what it does mean, according to his idea.

Mr. McCUTCHEN.—Q. (Continuing.) It might have meant September loading, might it?

Mr. HENGSTLER.—It might be proper to suggest here, if your Honor please, that the words in the contract are "'Cacicue' June loading."

The COURT.—I understand that, but he says it meant whenever the "Cacicue" returned to this port from her voyage to Vladivostok; now, pursuing that inquiry, counsel desires to learn whether this contract would extend over into August, September, October, November, December, or whatever time the ship got back from Vladivostok, and he wants to know if those words would cover all that period, and

(Testimony of Harvey E. Moore.)

I think that is a proper question to ask him, as he drew the contract.

Mr. McCUTCHEN.—Now, Mr. Reporter, will you read the question to the witness.

(Question read by the reporter.)

A. Well, that contingency did not arise, and I cannot answer your question.

Mr. McCUTCHEN.—For your Honor's information, the language of this contract is, in reply to the suggestion by counsel, and it appears opposite the word "shipment" in the margin: "Per American S. S. 'Cacicue' June loading."

Q. That is to say, the contingency which might have made it possible to load in September: Is that what you mean? A. Yes.

Q. Did the contingency which might make it possible to load in some month following June arise?

A. Well, she arrived late in June, I believe, and she—

Q. Answer the question. Isn't the question clear to you? [131] Is the question clear?

A. Yes, it is clear.

Mr. McCUTCHEN.—Now, Mr. Reporter, read the question to the witness.

(Question read by the reporter.)

A. If the steamer was ready to take on cargo on June 27th, I don't know whether she could have taken that on by the end of the month, or not; that is a question for the Operating Department to answer.

(Testimony of Harvey E. Moore.)

Q. Was that a subject of discussion in the office of Grace & Co. at that time?

A. I don't recollect that.

Q. You were having a great deal of discussion, as you have testified, with reference to this transaction, were you not?

A. My principal connection with it was in the early part of the arrangement.

Q. You have produced a letter here and read it in which the Ford Co. states that your engagement was for a loading in June, and that it had been informed that you would not be able to load until July, haven't you?

A. One of my letters, do you mean?

Q. I think so. Well, it was a letter to which you replied; you may not have written the letter. The June 1st letter.

A. I think the June 1st letter was from the Ford Co.

Q. Yes, it was to your office, and it came to your knowledge, did it not?

A. I did not reply to that letter.

Q. Did it come to you?

A. I was not in San Francisco at that time; it did not come to me at that time; I saw it afterwards, after it had been replied to.

Q. Was not that a subject of considerable discussion in the office of Grace & Co., as to when that ship should be loaded, and when it would be possible to load her?

(Testimony of Harvey E. Moore.)

A. I was not there [132] at that time, I don't know.

Q. How long were you there after that letter was written, after the letter of June 6th was written?

A. Probably ten days or two weeks after that.

Q. You were there on the 22d?

A. Yes, I had got back then.

Q. Wasn't it a subject of discussion in the office of Grace & Co. on or about or subsequent to the 22d of June, that is to say, when the ship was obligated to load, and when she would be called to load?

A. I cannot recall any specific conversations at that time about this.

Q. I am not asking you for specific conversations; did you not know at that time that the "Cacicue" could not load in June?

A. I cannot say that I did know it.

Q. And you have no recollection now of ever having heard that subject discussed, about the 22d of June, or the days following the 22d of June?

A. I don't recall it.

Q. Had you heard it discussed up to the time when you sent the telegram of the 26th of June, calling upon the Ford Company to deliver freight for loading on the "Cacicue"?

A. I probably had.

Q. Are you quite sure that you had?

A. I cannot testify positively that I had.

Q. Is it your present impression that you had?

A. It is my impression that I had.

Q. Then the letter, or the telegram, of the 26th

(Testimony of Harvey E. Moore.)

of June, was sent with a knowledge on your part that a very sharp question would arise with reference to the time when you should load the "Cacicue"; isn't that true?

A. Well, I think the Ford Co. had made that pretty plain.

Q. On the 28th, when you sent the letter which you have read, did you know then that the "Cacicue" could not load during [133] the month of June?

A. I am not an operating man; I cannot tell you what she could do.

Q. You said in that letter: "As you have failed to deliver the cargo alongside the steamer as fast as the vessel can load, demurrage at the rate of $3000 a day will begin,' etc.; had there been any failure to deliver freight as rapidly as the vessel could load?

A. I believe at that time the freight was tied up here in the yards.

Q. Answer my question, had there been any failure to deliver freight at that time as rapidly as the vessel could load?

A. My letter was undoubtedly founded on facts; I cannot recall just now what fact led up to it.

Q. Was the vessel in condition to load a pound of freight on the 28th of June?

A. You will have to ask our Steamer Department about that.

Q. Why, then, did you state that freight had not

(Testimony of Harvey E. Moore.)

been delivered alongside the vessel as rapidly as it could be loaded?

A. That letter must have been founded on information received from our docks, or from our Steamer Department.

Q. Were you so out of touch with the affairs of Grace & Co. with reference to a matter of that importance at that time that you did not know whether that vessel was in condition to receive freight, or not?

A. It was not my duty to examine the vessels.

Q. Then someone connected with Grace & Co. had given you the assurance, had they—

A. (Interrupting.) Undoubtedly.

Q. (Continuing.) That freight had not been delivered as rapidly as the vessel could load it?

A. Undoubtedly.

Q. Then you understood, when you penned this communication of the 28th of June, that from and after the 27th of June the vessel [134] was in condition to receive and load the Ford Co. freight?

A. I must have been so informed; yes.

Q. And you don't know from whom you got that information? A. I do not now; no, sir.

Q. You cannot suggest to us anybody connected with Grace & Co. who might have given you that information?

A. It might have been from our dock superintendent, or it might have come from the head of the Steamer Department; I cannot tell you.

Q. Did any of those people possibly tell you that

(Testimony of Harvey E. Moore.)

they were having great trouble in discharging the incoming cargo from the "Cacicue"?

A. I don't recall that.

Q. And you never heard that the vessel was having difficulty in discharging that incoming cargo?

A. I don't recall what she brought in, I don't recall what the cargo was.

Q. When you wrote that letter of the 28th, did you not know that the vessel would have to go into drydock before she could proceed on her return voyage? A. I did not know it.

Q. Had you ever discussed that with anybody?

A. That did not come within my province; I don't remember it.

Q. As you were the traffic manager, do you know that the ship did afterwards go into drydock?

A. It is my impression that she did, but I do not know.

Q. Did you write that letter of the 28th of June, and did you send the telegram of the 26th of June, on the direction of somebody else, or were they both, or was either of them, sent on your own initiative?

A. I think they must have been sent after consultation.

Q. With whom?

A. Mr. Carter was my chief; I would very likely talk it over with him.

Q. You remember, then, that you did send those two communications [135] pursuant to instructions from Mr. Carter?

(Testimony of Harvey E. Moore.)

A. It might not have been pursuant to instructions, but after consultation.

Q. Would you have assumed the responsibility of sending those communications on your own initiative? A. It is very doubtful.

Q. When you say that you may have talked with Mr. Carter, is it your best impression that Mr. Carter did tell you to send those two communications?

A. It is quite likely that I wrote out the telegrams and they were corrected before they went out.

Q. Have you any means of verifying that?

A. No, I have not.

Q. Why, if this matter was out of your department, did you write that letter of the 28th of June? Why wasn't it written by the man in whose department that part of the business fell?

A. They had no correspondence, as a rule, with the shipping public; that was all handled through the traffic department.

Q. Were you in the habit of writing any letter that a member of one of these other departments should tell you to write, with reference to business that had been initiated by you?

A. I would on request.

Q. Did you hear that the ship would have to undergo repairs at the time before you learned that she had actually gone into drydock?

A. I have no recollection of it.

Q. You were traffic manager: Will you give us a little more information, Mr. Moore, as to what your

(Testimony of Harvey E. Moore.)

duties were as traffic manager, and what was the scope of your authority?

A. My principal duty was to secure cargo for our steamers.

Q. Did you have anything to do with the transaction after the contract of affreightment was made?

A. In what way do you mean?

Q. In any way. Did your connection with the matter end a soon as a contract for the shipment of freight was made?

A. No; it would be up to me to get the cargo here to go aboard [136] the steamer.

Q. That is, to see that the cargo was delivered on the dock?

A. To keep after the railway people and see that the cargo arrived in San Francisco.

Q. And was put on the dock alongside the ship?

A. No, that would apply principally to our dock superintendent; he would call on the railway for the cargo as he wanted it.

Q. Was he under your instruction? A. No.

Q. Do you know, or did you learn, when the first shipment or delivery of automobiles was made by the Ford Company on the dock?

A. I cannot tell you.

Q. Did you ever hear that any delivery was made?

A. If any deliveries were made, I probably heard of it.

Q. If any deliveries would have been made you would have heard of it? A. Probably.

(Testimony of Harvey E. Moore.)

Q. Didn't you hear that a delivery of 1100 tons had been made down there?

A. I probably knew of it at the time, but I don't recall the circumstance now.

Q. Then if there was a delivery by the Ford Co. of 1100 tons of automobiles on the dock on the 23d and 24th days of June, you knew of it at the time, did you?

A. Well, it is probable; I won't say that I did know it.

Q. Who told you to state specifically to the Ford Company that it would be held liable for demurrage at $3000 per day? A. I cannot tell you that.

Q. Where did you get the $3000, where did that come from?

A. It is in the contract, I believe.

Q. And you intended to tell the Ford Motor Co. in that letter that that contract was still in force as to the demurrage feature of $3000 a day, did you?

A. Yes. [137]

Q. In one of these letters from the Ford Company it is said that they had been informed that you had effected a clearance of that ship to sail in July; was that the fact? A. Not to my recollection.

Q. Would you know that, if it had been the fact?

A. I would not.

Q. That was not within your department?

A. No, sir.

Q. Did you know anything about the cargo that was brought in on the "Cacicue" at that time?

A. I don't remember what it was.

(Testimony of Harvey E. Moore.)

Q. That was also not in your department; that is to say, your department was not concerned with that feature of the business?

A. It might have been, but I don't recollect what that was.

Q. You don't remember that she had on board about 7900 tons? A. No, I do not.

Q. Do you remember how long, as a matter of fact, was required to discharge that cargo?

A. I do not.

Q. Do you know when the "Cacicue" was ready to go to sea, after arriving on the 27th of June?

A. I cannot recall the date. You see, it is over four years ago, and I cannot remember that.

Q. Was it late in the month of July, at any rate after the middle of July?

Mr. HENGSTLER.—There is no question about when she went to sea, as far as those dates are concerned, Mr. McCutchen.

A. I can get the date for you, but I don't know it now.

Mr. McCUTCHEN.—Is it conceded, Doctor, that she was not ready to go to sea until the 27th of July?

Mr. HENGSTLER.—It is conceded that she went to sea on the 27th of July.

Mr. McCUTCHEN.—Is it conceded that she was not ready, that she could not have gone to sea earlier than that?

Mr. HENGSTLER.—No, it is not; on the contrary, we claim [138] she could have gone to sea earlier if it had not been for delays that were partly

(Testimony of Harvey E. Moore.)

due to the nondelivery of this shipment. As a matter of fact, she did not go to sea until July 27th. We will concede that, and we will concede all the dates with reference to where she went, and when she was in port, and so on.

Mr. McCUTCHEN.—I understand you to say now she could have gone to sea earlier if the Ford Co. had delivered this cargo?

Mr. HENGSTLER.—Yes, and also that she could have loaded earlier.

Mr. McCUTCHEN—How much earlier?

Mr. HENGSTLER.—Well, that I am not prepared to say.

Mr. McCUTCHEN.—Will you fix a date when she could first have begun to take on cargo?

Mr. HENGSTLER.—I am not a witness now.

Mr. McCUTCHEN.—No, but you are here representing the libelant.

Mr. WILLIAMSON.—And it will save time.

Mr. McCUTCHEN.—Q. Do you know whether the utmost effort was being made between the time the "Cacicue" arrived here and the time when she actually left to go on her outward-bound voyage?

A. We always did that; we always turned our boats around as soon as we could.

Q. So that if the "Cacicue" did not leave here until the 27th of July, that, as you understand it, was the first date when it would have been possible for her to leave?

A. Well, I won't make that affirmative statement,

(Testimony of Harvey E. Moore.)

Q. Then I will put it to you negatively: Do you know whether it would have been possible, with the utmost expedition, the "Cacicue" having arrived here on the 27th of June, to have gotten [139] her in condition to proceed on her outward voyage earlier than the 27th of July?

A. I do not know what her condition was when she arrived; I have no idea what held her up here that length of time.

Q. You say that on the 26th of June you sent a telegram to the Ford Company, which you confirmed in a letter; the letter which you wrote stated, did it not, that that telegram was sent in response to the Ford Company's letter of June 14th, and its letter of June 24th; that is correct, is it not?

A. I think it is.

Mr. McCUTCHEN.—Has your Honor that letter of the 26th in mind, or the telegram of the 26th? If your Honor has not that in mind, I would like to call your attention to it.

The COURT.—I remember it in a general way.

Mr. McCUTCHEN.—I was going to ask the witness some questions about it, and I would like to have you have that clearly in mind before I do so.

Q. Now, Mr. Moore, you did two things with reference to this: You sent a telegram to the Ford Motor Company in Canada; that is correct, is it not? A. Yes.

Q. That was on the 26th? A. Yes.

Q. You confirmed that telegram in a letter to the Ford Motor Co. of Canada, in which letter you

(Testimony of Harvey E. Moore.)

stated that the telegram was sent in response to the two letters of June 14th and June 24th; that is correct, is it not?

A. Here is the letter.

Q. That reads: "We have your letter of June 14th, received June 23d, also letter of June 24th from the Ford Motor Co. of San Francisco." So that that telegram was sent in response to those two letters; that is correct, is it not?

A. That is what it says. [140]

Q. At the same time, or about the same time, you addressed a letter to the Ford Motor Co. of San Francisco, in which you repeated a copy of that telegram, did you not? A. Yes.

Q. Stating that you had transmitted that to the Ford Co. in Canada? A. That is a matter of record.

Q. What did the libelant do after that time with reference to this transaction, and up to the time that this libel was filed?

A. The matter passed out of my hands.

Q. So far as you know, it didn't do anything, did it?

A. Well, shortly after that we made efforts to secure cargo to—

Q. Do you know when this libel was filed, Mr. Moore? A. No, I do not.

Mr. McCUTCHEN.—Does your Honor remember when the libel was filed?

The COURT.—I think the date has been stated here.

(Testimony of Harvey E. Moore.)

Mr. McCUTCHEN.—The libel was filed on the 27th of June.

The COURT.—Yes. We met this once before several years ago didn't we, in some collateral proceeding, or on a motion of some kind?

Mr. McCUTCHEN.—Yes, your Honor.

Q. Did you make any efforts to secure cargo before this libel was filed, which was filed on the afternoon of the 27th of June?

A. I don't remember when we began working on that feature of it.

Q. So far, then, as you know, you had no communication of any kind,—and when I say "you," I mean the libelant, you had no communication of any kind with the respondent after you sent those letters and the telegram of the 26th of June, up to the time that the libel was filed?

A. I do not recall any that have not been introduced in evidence so far.

Q. And when I say "communication," I mean written or verbal, or [141] a communication of any kind or character. I understand you to say that so far as you know, no such communication was made? A. I don't recall any.

Q. Did you ever see the captain who brought that ship into port?

A. I don't even remember who the captain was.

Mr. McCUTCHEN—What was the name of the captain, Doctor Hengstler—can you tell us?

Mr. HENGSTLER.—His name was Mueller.

(Testimony of Harvey E. Moore.)

Mr. McCUTCHEN.—Q. Does that name enlighten you at all, Mr. Moore?

A. I remember Captain Mueller very well. He probably came up to the office after the steamer came in.

Q. You have no present recollection whether you talked with him, or not, after he returned from that voyage? A. No.

Q. You say you probably knew that freight was delivered on the dock by the Ford Co.; does the figure 1100 tons mean anything to you, does it refresh your recollection?

A. No, it does not.

Q. It does not? A. No.

Q. You do not recall now ever having heard that quantity of freight discussed, that is to say, 1100 tons? A. I don't recall it.

Q. Or 1100 packages?

A. No, I don't recall it.

Q. When this libel was filed, was there any discussion with you by anybody representing Grace & Co., or acting for Grace & Co., as to an effort to foreclose a maritime, or an alleged maritime lien upon that 1100 tons or 1100 packages of freight?

A. I don't think so; it would not concern me.

Q. What is that?

A. It would not concern me; I don't think I was consulted about it.

Q. You would not have been called into that feature of the matter? A. No. [142]

Q. You would not have been a member of a con-

(Testimony of Harvey E. Moore.)

ference taking that subject up? A. No.

Q. You read this morning a letter dated June 6th, which you said was sent by Mr. Carter, your sub-manager; do I understand you to say that this package of papers which you have on your lap now was your file? A. Yes.

Q. Then that letter composed by Mr. Carter was in your file, was it?

A. A copy of it; he always made several copies of all the letters written in the office for various files.

Q. Did he consult with you before he wrote that letter?

A. I was not in San Francisco at the time.

Q. Is there another letter in your file dated the 6th of June?

A. Here is a copy of a letter apparently dictated by Mr. Mann.

Q. I have called your attention to a letter dated the 22d of June, which you say was written by you to the Ford Company; what was the occasion of the writing of that letter, Mr. Moore?

A. It seems to be a notice to them that the cargo is to be delivered to us.

Q. You had written them the same thing, had you not, in your letter of June 6th?

A. I don't know why it was necessary to reiterate the information to them.

Q. As far as you know, you had not received anything from them following your letter of June 6th, and up to the 22d of June, had you, that would have

(Testimony of Harvey E. Moore.)

made it a prudent or a proper thing to write this letter of the 22d?

A. We had received this letter in the meantime from Mr. Davis.

Q. You got that on the 24th; you had not that in hand on the 22d, when you wrote this letter?

A. I beg your pardon, it was received here on the 26th.

Q. Yes, exactly, but this letter is dated the 22d. [143]

A. Oh, yes, I see.

Q. You suggest that this is supplemental to your letter of June 6th.

A. I cannot recall the circumstances that led up to the writing of that letter.

Q. Is it not the fact that that letter was probably written in answer to their letter of the 14th of June, or because you had received their letter of the 14th of June?

Mr. HENGSTLER.—Just see when that letter of the 14th of June was received by your office, Mr. Moore.

A. It was received June 23d.

Mr. HENGSTLER.—That would be after this letter was written.

Mr. McCUTCHEN.—Yes, the mark so indicates, but I was wondering whether that was not a mistake. That letter was sent on the 14th, and according to this stamp was not received until the 23d, which was a very long interval.

(Testimony of Harvey E. Moore.)

Mr. HENGSTLER.—There may have been a Sunday intervening.

Mr. McCUTCHEN.—Even so, that is nine days.

Q. Do you know why it is that you waited until the 26th to reply to that letter of the 14th of June, which you received on the 23d?

A. It is quite possible a Sunday might have intervened there, a Saturday afternoon and Sunday; I don't know, though.

Q. It seems to me I recall you said you sent that telegram on Monday, the 26th; that may be the explanation for it. I don't know what day of the week that date fell on. It seems to me now that I do recall that you said that was on Monday.

A. Here it is (showing).

Q. Yes, that might afford an explanation for that. At any rate now, to fix those dates, there is no doubt that the letter of June 14th was in hand in your office on the 23d of June?

A. It bears the office stamp of that date. [144]

Q. That would mean that it had been received on the previous Friday?

Mr. HENGSTLER.—How do you mean, Mr. McCutchen?

Mr. McCUTCHEN.—If Monday was the 26th, the 23d would have been the previous Friday, wouldn't it?

Mr. HENGSTLER.—Yes.

Mr. McCUTCHEN.—Sunday the 25th, Saturday the 24th, and Friday, the 23d.

Mr. HENGSTLER.—Yes.

(Testimony of Harvey E. Moore.)

Mr. McCUTCHEN.—Q. You were not concerned with informing yourself as to what cargo the "Cacicue" was bringing in on that voyage, if I understand you correctly? A. I was not; no.

Q. Do you know anything about the length of time required to discharge cargo?

A. It depends on the nature of the cargo, and what the facilities are, and what kind of a vessel it is.

Q. Do you know what length of time would have been required to discharge a miscellaneous cargo of 7900 tons from the "Cacicue" immediately following the 27th of June, 1916?

A. I witnessed the discharge of 7500 tons of cargo from one ship in one day, 24 hours, in Salina Cruz.

Q. What I want to know is whether you have any information as to the length of time which would be required to discharge a cargo of 7900 tons from the "Cacicue," beginning the 27th of June and continuing until it was discharged?

A. That would be a question for our Operating Department to answer.

Q. You have not any opinion on that subject at all? A. No.

Q. And I suppose you also have a lack of knowledge as to the time that would be required to load a cargo on to the "Cacicue"?

A. I could not give you any exact figures on it.

Mr. McCUTCHEN.—That is all. Will this witness remain in [145] attendance, Doctor?

Mr. HENGSTLER.—Yes, I think so.

(Testimony of Harvey E. Moore.)

Mr. McCUTCHEN.—I don't know that we will want to recall him, but we might.

Mr. HENGSTLER.—Q. You expect to be here a few days, Mr. Moore, do you not?

A. I will remain as long as you want me.

Mr. McCUTCHEN.—I would like to have the witness remain within call; we might want to call him again.

Redirect Examination.

Mr. HENGSTLER.—Q. Mr. Moore, Mr. McCutchen examined you on your experience with reference to writing this kind of a booking contract. Suppose, in writing a booking contract, you had intended to put the time when the shipment must be made so that that time should be guaranteed, how would you express such an intention?

Mr. McCUTCHEN.—I object to that, if your Honor please, as calling for the speculation of the witness.

The COURT.—The objection is overruled.

A. Cargo to be delivered alongside the vessel on or before such a date.

Mr. HENGSTLER.—Q. You know what is meant by a cancelling date in that kind of a contract?

A. Yes.

Q. What is the ordinary wording when a cancelling date is intended in a contract with reference to the time when a shipment must be delivered?

A. If the cargo is not delivered on or by such a date, the contract would be cancelled. There is no set form for it.

(Testimony of Harvey E. Moore.)

Q. That is what you would have done if it had been intended to put a cancelling date into this contract? A. Yes.

Q. Now, Mr. Moore, will you refer to your file there and to a [146] letter written by an officer of the Southern Pacific Company to another officer of the Southern Pacific Company in San Francisco, referring to the arrival of some of the cars constituting this shipment, that letter being dated May 10? A. Here is a copy of such a letter.

Q. Will you please read this letter to the Court?

A. (Reading:) The letter is written on the stationery of the Southern Pacific Company, Pacific System, dated San Francisco, Cal., May 10, 1916.

"Mr. W. J. Hardy,

"San Francisco, Cal.

"Supplementing our letters of May 5th, 8th, and 10th, desire to state that the Ford Motor Co. of Canada, Ltd., forward from Walkerville, Ont., May 4th—

LV 8247
B&M 64062
Via G. T., I. C., U. P., S.P.
B&O 192750
WAB 71,867
Via Wab., U. P., S. P."—

Mr. McCUTCHEN.—I do not understand that this letter was written to this witness or by him.

Mr. HENGSTLER.—No, it was not, but what I desire to show is—

Mr. McCUTCHEN.—I do not think that this is

(Testimony of Harvey E. Moore.)

the proper way to make that offer. I think it ought to be offered either while the man who wrote it or the man who received it is on the stand. There might be some explanation of it.

Mr. HENGSTLER.—What I desire to show is this, if your Honor please, that this letter was written in the course of this transaction, and, as the letter itself shows in the body of it, notice of that letter was sent to both parties— [147]

Mr. McCUTCHEN.—If that is the fact, I do not make any objection to it. I have not seen the letter.

Mr. HENGSTLER.—To Grace & Co., to your people, and I think Mr. Williamson has probably got there in the file a copy of this letter.

A. (Continuing.) "CB&Q 116756

Via G. T., C. B. & Q., U. P. and S. P.

CRI&P 36560

Via G. T., R. I., D. & R. G., S. P.

"All for the S. S. 'Cacicue' June or early July.

"J. B. STUBBS.

c. c. W. R. Grace & Co. Attention Mr. Moore.

Ford Motor Co. Attention Mr. Davis,

Mr. A. F. Frye."

That is a carbon copy to him.

Q. Did Mr. Davis, or anybody on behalf of the Ford Motor Co., at any time take any exception to the statement in that letter with reference to the "Cacicue" late June or early July?

Mr. McCUTCHEN.—I object to that. That seems to be a letter written by the railroad company, and I do not think it would have been neces-

(Testimony of Harvey E. Moore.)

sary for the respondent to have taken any exception to it, in so far as Grace & Co. were concerned.

The COURT.—That seems to me to be true. This was apparently a letter from the railroad itself to itself, was it not? A. A carbon copy.

The COURT.—But the letter, itself, was not a letter that called for a reply from anybody. It would be a communication from one department of the railroad to another, or from one railroad man to another, concerning this shipment—was it not?

A. Yes.

Q. A copy of which was sent to Grace & Co. and to the local Ford [148] Co., but they are not bound by any declaration made there. They are not bound to reply to it. They could not make a contract for them.

Mr. HENGSTLER.—I am not offering the letter for that purpose, but I am offering it for the purpose of showing that all of the parties who were concerned in this shipment and who were active in this shipment understood at the time this letter was written that it was to be a shipment late June early July, and that that understanding was brought to the notice of the other side, and the other side acquiesced in it.

The COURT.—You cannot show it by that letter, because whoever wrote that letter either knew that to be a fact or did not; if you can get him here you can get from him that information, but you cannot prove it by the letter.

Mr. HENGSTLER.—I will get the evidence

through the party who wrote the letter. Of course, I appreciate that it would have no direct weight, except that it corroborates the other evidence that all parties understood about this shipment that time was not of the essence of the contract.

The COURT.—That may have been what the railroad company understood, but that is not going to establish this contract.

Mr. HENGSTLER.—I desire to save an exception to your Honor's ruling, if it is ruled out at the present time.

The COURT.—Yes. That would not preclude you from bringing the writer of this letter here to show that he received from respondent the information that that was their understanding of the contract.

Mr. HENGSTLER.—I will try and bring the writer here, if I can locate him.

Now, if your Honor please, I am informed that Mr. Carter has arrived [149] in the city, but that he is not well and not able to appear in court this afternoon, that he got sick on the train, and I would ask for a continuance until to-morrow morning.

The COURT.—Is Mr. Carter the only other witness you have?

Mr. HENGSTLER.—There is one possible witness whom I may have to call, but I am not certain until I see Mr. Carter whether it is necessary to call him.

The COURT.—If we finish up by noon will that give you time to put your witness on who has to depart?

Mr. McCUTCHEN.—Yes, but if it does not, I am going to ask Dr. Hengstler and the Court to call that witness out of order, as he must leave on Wednesday.

Mr. HENGSTLER.—I have no objection to calling him at nine o'clock tomorrow.

Mr. McCUTCHEN.—I prefer not. I would rather have as much of the libelant's case in as possible.

The COURT.—We will take this matter up again at ten o'clock.

Mr. HENGSTLER.—Just a moment. I called for the production of a number of papers of correspondence between the Ford Motor Company of Ontario and the Ford Motor Co. of San Francisco bearing upon this question, and I would like an opportunity to inspect those records. It would save the time of the Court if I could inspect them between now and to-morrow, instead of going through them at the time of the trial to-morrow.

Mr. WILLIAMSON.—This request was made, if your Honor please, on Saturday.

Mr. HENGSTLER.—I made a motion to produce them some weeks ago, two weeks ago.

Mr. WILLIAMSON.—Two weeks ago, but you abandoned that, I believe, did you not? [150]

Mr. HENGSTLER.—Three weeks ago.

Mr. WILLIAMSON.—At any rate, it makes little difference, except this, that the Ford Co's records in San Francisco, other than those which were available to me in 1916, under the policy prevailing in

San Francisco, the American Ford Co. for some years apparently have destroyed records within the last two years without our knowing it, so I cannot produce what they have destroyed, but I have a little here that was given to me in 1916.

The COURT.—Will you let them see what you have?

Mr. WILLIAMSON.—Yes. The Canadian Ford files, of course, are entirely beyond my reach now. It takes some time to get them. I have some here without knowledge that you wished for them, because we wished to have them here. The communications from myself to the Ford Co. are in the different files.

Mr. HENGSTLER.—I do not ask you for those.

Mr. WILLIAMSON.—If you will tell me anything you want, I shall be glad to show it to you.

The COURT.—If you will tell him what you have, he will tell you what he wants, I assume.

Mr. WILLIAMSON.—I could not produce all our correspondence for a year or more.

The COURT.—I do not suppose you would be asked to, but those bearing on this controversy you ought to be able to.

Mr. GRIFFITHS.—I asked you, Dr. Hengstler, for the blue-prints of the vessel. Will you get those and the log-book? If we can have those in the meantime it will help us.

Mr. HENGSTLER.—I received a notice to produce some papers late on Saturday; nevertheless, I will give you all we have; we have some blue-prints,

but not all of them, but everything I [151] will let you have, that we have.

(An adjournment was here taken until to-morrow, Tuesday, November 16th, 1920, at ten o'clock A. M.)

[Endorsed]: Filed Nov. 27, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [152]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

Before Hon. MAURICE T. DOOLING, Judge.

VOLUME 2.

W. R. GRACE & CO., INC.,

Libelant,

vs.

FORD MOTOR CO. OF CANADA, LTD., a Corporation,

Respondent.

Tuesday, November 16, 1920.

COUNSEL APPEARING:

For the Libelant: L. T. HENGSTLER, Esq.

For the Respondent: E. J. McCUTCHEN, Esq., W. F. WILLIAMSON, Esq., and F. P. GRIFFITHS, Esq.

Mr. HENGSTLER.—Mr. McCutchen, did you say you wished Mr. Moore for further questions?

Mr. McCUTCHEN.—No, I simply wanted him

(Testimony of Harvey E. Moore.)

in attendance. I do not want to question him any further now.

Mr. HENGSTLER.—I will recall him.

**Testimony of Harvey E. Moore, for Libelant (Recalled).**

HARVEY E. MOORE, recalled for libelant.

Mr. HENGSTLER.—Q. Mr. Moore, you desire to correct an answer which you gave yesterday to one of my questions on redirect examination, do you not? A. I do.

Q. I will call the question and answer to your mind; it is on [153] page 64 of the transcript.

> "Q. What is the ordinary wording when a cancelling date is intended in a contract with reference to the time when a shipment must be delivered?
>
> "A. If the cargo is not delivered on or by such a date the contract would be cancelled; there is no set form for it."

That is the way the answer reads. In what respect do you wish to correct this answer?

A. What I intended to say was this, if the ship is not ready to load on or by a certain date, shippers would have the option of cancelling.

Q. You have not gone over your testimony in full, have you? A. No.

Mr. HENGSTLER.—That is all for the present. It may be that when Mr. Moore reads over his entire testimony he might have some minor corrections to make.

(Testimony of G. H. Carter.)

Mr. McCUTCHEN.—You may have some further testimony from Mr. Moore, is that what you mean?

Mr. HENGSTLER.—No, only possibly he might want to correct some portion of his testimony; we have not been able to go over it all yet.

Mr. McCUTCHEN.—In view of that suggestion, I think we shall pass any further examination we have; I don't know that we will have any. If Mr. Moore has any further corrections to make in his testimony, I would be glad to have them made now.

Mr. HENGSTLER.—I don't know that he has any. We have not yet been able to read the transcript in full.

**Testimony of G. H. Carter, for Libelant.**

G. H. CARTER, called for the libelant, sworn.

Mr. HENGSTLER.—Q. Mr. Carter, what is your business?

A. Shipping, with W. R. Grace & Co. [154]

Q. What is your position with W. R. Grace & Co.? A. I am manager.

Q. What was your position during the year 1916? A. I was assistant or sub-manager.

Q. Did you in that connection come into contact with Mr. L. C. Davis, of San Francisco, in connection with a contract made with the Ford Motor Co. of Canada? A. Yes.

Q. When did you first meet Mr. Davis in that connection, as near as you can remember?

A. In February; Mr. Moore brought Mr. Davis

(Testimony of G. H. Carter.)

in to see me regarding the possible arrangement to give them a steamer for Australia.

Q. As nearly as you can remember, what was the conversation between you and Mr. Davis?

A. Mr. Davis wanted a steamer in position to take cargo which would be shipped from his Canada factory in May.

Q. What was the cargo to consist of?

A. Automobiles.

Q. Was the quantity mentioned at the time when Mr. Davis called upon you?

A. Yes, some 6,000-odd tons; I think it was 6,200 tons.

Q. What did he desire you for W. R. Grace & Co. to do in connection with that cargo?

A. He wanted to know if it was not possible for us to divert one of our steamers from the regular trade, in order to be able to take care of this business for them, to carry this cargo from San Francisco to Australia.

Q. And what did you tell him?

A. At first I told him it would not be possible, as it seemed at that time there was no chance of our arranging a steamer, but at a later meeting with Mr. Davis, after going over our records and our business, I found that we might be able to put in the steamer "Cacicue."

Q. Why did you select the steamer "Cacicue" for that purpose?

Mr. McCUTCHEN.—We object to that as immaterial and [155] irrelevant.

(Testimony of G. H. Carter.)

The COURT.—The objection is overruled.

A. All our other steamers were on regular runs, which made it impossible to withdraw them, and the "Cacicue" was the only possible boat which we could divert to any business from our regular business.

Mr. HENGSTLER.—Q. What were Mr. Davis' requirements for the steamer, as he stated them to you, in his conversations with you?

A. He wanted a steamer capable of carrying the entire amount of 6,200 tons, and was particularly anxious that the steamer should not be too early.

Q. Did he give any reason why he did not wish the steamer too early?

A. They were crowded in getting out automobiles at their factory; the discussion at that time was the possibility of their cargo not being ready in case a vessel made early June.

Q. What did you tell them with reference to the movements of the "Cacicue" at the time when your conversations took place?

A. I outlined the voyages the "Cacicue" was to make; she was then on the way to the West Coast of South America, to complete her cargo for the Northern Pacific ports here. She was bound for, I think it was, 5,000 tons of nitrate. On bringing that nitrate here and discharging the nitrate, and the coffee which she then had on board, she was booked for a voyage to Vladivostok, and on her return from that voyage she was due in San Francisco some time in June, and it was at the termination of that voy-

(Testimony of G. H. Carter.)

age that we made this freighting agreement to take this cargo of automobiles.

Q. What do you mean by saying she was due in San Francisco sometime in June?

A. Figuring her schedule and the time that she normally would make, and estimating the time for loading [156] and discharging, she would be what we would call scheduled arrival in June.

Q. What information was given to Mr. Davis with reference to the time of her arrivals?

Mr. McCUTCHEN.—Q. That is, you mean by the witness?

Mr. HENGSTLER.—Q. (Continuing.) Yes, by you, or by Mr. Moore in your presence.

A. Do you mean at this meeting in February, or later?

Q. At any meetings in February, prior to making the contract?

A. As I remember, Mr. Davis was there when we roughly figured the position of the vessel, and what her position would be at the end of the Vladivostok voyage. I do not remember the exact date in June that that calculation brought the ship, but it was known to be an estimated date, only.

Q. What did you understand by the wording: "'Cacicue' June loading," in the contract that was thereafter made with Mr. Davis?

Mr. McCUTCHEN.—Well, it does not appear that the witness drew the contract, or signed the contract.

Mr. HENGSTLER.—Q. Did you have anything

(Testimony of G. H. Carter.)

to do with the making of the contract, Mr. Carter?

A. No, nothing to do with the making of the contract. The contract was made by Mr. Moore on authority from me to close the business, and—

Mr. McCUTCHEN.—One moment; I object to any conversation between Mr. Carter and Mr. Moore. This libel declares upon this contract as the contract of Grace & Co.; I think we are not bound by any conversation between Mr. Moore and Mr. Carter prior to the making of the contract, or, indeed, after the making of the contract.

The COURT.—Well, that seems to close the incident. All the witness stated was that the contract was made by Mr. Moore upon [157] his authorization. There you are.

Mr. HENGSTLER.—Q. Mr. Carter, you have had vast experience in the making of freight engagements, have you not?

A. I suppose you might call it vast; I have had considerable experience.

Q. How long have you had experience in that line? A. Fifteen years.

Q. Could you give the Court any idea of how many freighting contracts, approximately, during those fifteen years, you made with different parties?

Mr. McCUTCHEN.—I would like to inquire whether this testimony is offered for the purpose of explaining what counsel claims to be an ambiguity in this contract.

Mr. HENGSTLER.—Yes, it is, your Honor.

Mr. McCUTCHEN.—And of what does that ambiguity consist?

Mr. HENGSTLER.—I desire to follow it up by asking him what he, with his experience and after he saw this contract, understood by the words "'Cacicue' June loading."

Mr. McCUTCHEN.—Is it claimed by you, then, that those words are ambiguous?

Mr. HENGSTLER.—Those words are certainly ambiguous in the sense that they need explanation by the witness.

Mr. McCUTCHEN.—There is no suggestion in the pleading of any ambiguity in the contract. The contract is declared upon as it was drawn.

Mr. HENGSTLER.—Those words are certainly ambiguous, because they might mean "'Cacicue' guaranteed June loading," or "'Cacicue' expected June loading." On the very face of it, those three words, it seems to me, require explanation.

Mr. McCUTCHEN.—There is no suggestion or effort to reform this contract in any way. It seems to me it is not permissible, [158] particularly for this witness, who did not participate in the drawing of the contract, to state what he understands the contract to mean. That is for the Court to determine.

Mr. HENGSTLER.—This particular witness, while he did not make the contract, is the manager of the libelant that made the contract.

The COURT.—We will take the testimony.

Mr. HENGSTLER.—And further, your Honor,

(Testimony of G. H. Carter.)

he was as much interested in it as if he had made it himself, in its meaning and in its wording.

The COURT.—Proceed.

Mr. HENGSTLER.—Will you read the last question, Mr. Reporter?

(Question read by the reporter.)

A. I have no idea, but, of course, we have made a large number of freighting contracts.

Q. There would be hundreds of them, anyway, would there not, Mr. Carter? A. Possibly.

Q. What did you understand by the words of this contract after it was made, and in the light of what happened between you and Mr. Davis, "Shipment per American S. S. 'Cacicue' June loading"?

Mr. McCUTCHEN.—That question is duplex. If the answer is to be based to any extent on what happened between him and Mr. Davis, I submit that ought to be developed, so that we can present our objection properly.

The COURT.—Yes, that is true. I suppose you mean, based on what he has already testified to as having occurred between himself and Mr. Davis?

Mr. HENGSTLER.—Yes, your Honor.

Mr. McCUTCHEN.—In the light, then, of that amendment or [159] suggestion, I submit that it is entirely immaterial and irrelevant what this witness understood the contract to mean after the contract was signed. The opinion of the witness on that subject is incompetent. And I make the further objection I made a while ago, that this libel

(Testimony of G. H. Carter.)

declares on this contract as it reads, without any suggestion that there is any ambiguity in it.

The COURT.—That is quite true, and there may be no ambiguity in it, but there may be a meaning attached to the words "June loading," "July loading," or "August loading," as the term may be used in shipping circles, that can be explained, that can be stated.

Mr. McCUTCHEN.—Then I think he should be asked for the specific statement of what they mean.

The COURT.—I was about to suggest that you had better ask him not what he understood by that, but what do the words "June loading," mean in a contract of this character.

Mr. McCUTCHEN.—That is it, your Honor.

Mr. HENGSTLER.—Q. What do these words, "Shipment per American S. S. 'Cacicue' June loading" mean?

Mr. McCUTCHEN.—I submit that the question ought to be confined to the words "June loading." That is the sharp issue, as I understand it now. The words "Shipment per American S. S. 'Cacicue'" have nothing to do with the interpretation of the words "June loading."

The COURT.—Well, answer the question in that connection, the meaning of those words as used in that contract. What is the ordinary meaning of the term "June loading," as used in shipping contracts?

A. Ordinarily, it would mean that loading would commence before the end of June. [160]

(Testimony of G. H. Carter.)

Q. Would commence before that time?

A. Yes, would commence before the 30th day of June, loading to be commenced, but in a contract of that kind, where the June loading was to fix the loading of the ship—

Mr. McCUTCHEN.—One moment; I object to that as not an answer to the question.

The COURT.—The objection is overruled; I want to know all about it.

A. (Continuing.) In a contract of that kind, where the contract was to guarantee June loading, that contract would also show a clause stating when the lay days would commence and what the cancelling date was; in other words, there would be two fixed dates.

Q. Ordinarily, then, a contract calling for June loading would be fulfilled if the ship began to load on the 30th of June?

A. Yes; that is my understanding.

Mr. HENGSTLER.—Q. Mr. Carter, was Mr. Davis informed at the meetings which you had with him with reference to the time when the "Cacicue" would make her first arrival in San Francisco after February 25th?

A. Yes; she was due in San Francisco sometime in March, from the West Coast of South America.

Q. That was explained to him?

A. Yes; the entire voyages of the "Cacicue" were explained to him up to the time when she was to make the voyage for this particular business.

Q. He understood, then, that the vessel should

(Testimony of G. H. Carter.)

not be loaded at that particular arrival of the vessel in San Francisco, did he not?

Mr. McCUTCHEN.—I suppose counsel means that that was stated. I think it would be much better if the witness were asked whether such a statement was made, and, if so, by whom. [161]

Mr. HENGSTLER.—Q. Was that stated to him?

A. Will you repeat that, please?

Q. Was it stated to him, or did he state that he did not desire the "Cacicue" for his automobiles on the next arrival of the "Cacicue" in port, after your conversations with him?

Mr. McCUTCHEN.—I object to that as immaterial and irrelevant.

The COURT.—Well, there does not seem to be any contention that he did expect to leave in March; the articles were not to leave the factory until May. It does not throw much light on it, but if counsel desires it you may answer the question, Mr. Carter.

A. Mr. Davis made no request for shipment on that first arrival of the vessel, but he knew that the vessel would be in San Francisco in March, but we were not able, had he wanted her, to have given her at that time.

Mr. HENGSTLER.—Q. Mr. Carter, I hand you a letter contained in a file which Mr. Moore identified yesterday as the office file of W. R. Grace & Co. in connection with the steamer "Cacicue." Have you seen that letter before? A. Yes.

Q. Was that letter received by you? A. Yes.

(Testimony of G. H. Carter.)

Q. At what time? A. On July 5th.

Q. It is dated July 5? A. Yes.

Mr. HENGSTLER.—We offer that in evidence, if your Honor please. Any objection?

Mr. McCUTCHEN.—I do not think we have any objection. That correspondence was long after the filing of this libel.

The COURT.—If you have none, I have none.

Mr. McCUTCHEN.—What is the purpose of it, Doctor?

A. It has a bearing upon some of the questions which you seem [162] to have raised; it is correspondence that followed afterward. I will withdraw it if you do not want it.

Mr. McCUTCHEN.—I am perfectly willing it should go in, but I do not see why it should be offered here and encumber the record.

The COURT.—I would have to see the letter; it could not have any effect unless it bears upon the amount of the damages. That might well be affected by many things that occurred after the filing of the libel.

Mr. HENGSTLER.—It is one of the series of letters which shows what arrangements were made between the parties for the purpose of minimizing the damages after the libel was commenced. It is only one of the series.

Mr. McCUTCHEN.—If that is the purpose, I do not think we have any objection.

Mr. HENGSTLER.—If, however, you will admit that steps were taken for the purpose of min-

imizing the damages, and that the libelant performed its duty in that regard, I will not offer the correspondence.

Mr. McCUTCHEN.—We have no objection, if that is the purpose of the offer.

Mr. HENGSTLER.—The letter reads as follows. It is on the letter-head of Mr. W. F. Williamson:

"July 5th, 1916.

"Messrs. Grace & Co. and
"Andros & Hengstler,
"Their Attorneys,

"Dear Sirs: [163]

"In response to your request for written confirmation of our previous offers, on behalf of the Ford Motor Company of Canada, Ltd., we tender you 4650 odd tons automobiles and parts for shipment at going rate of Thirty-five Dollars ($35.00) per ton of 40 cubic feet measurement on S. S. 'CACIQUE' to Wellington, New Zealand, and Sydney, Australia, as indicated on the packages. We are prepared to make immediate delivery alongside steamer when she is ready to load.

"As an alternative, we are also authorized to tender you for such shipment the said tonnage at $47.50 for each such ton provided you accept same in full settlement and satisfaction of all claims and demands against the Ford Motor Company of Canada, Ltd., this to be treated as an offer of compromise without prejudice to my client's rights or claims.

"Yours respectfully,
"W. F. WILLIAMSON."

(Testimony of G. H. Carter.)

The CLERK.—You do not want that marked as an exhibit?

Mr. HENGSTLER.—No. I understand that all of the correspondence that was read into the record is in evidence.

Q. What is your answer to that letter, Mr. Carter? A. Shall I read the letter?

Q. Yes.

The COURT.—Have you seen it?

Mr. McCUTCHEN.—Yes, your Honor, we have it. [164]

A. (Reading:)

"July 6th, 1916.

"The Ford Motor Company of Canada,
"c/o W. F. Williamson,
"Rm. 1112–1119 Merchants National Bank Bldg.,
"City.

"Dear Sirs:

"Referring to your favor of July 5th, we have never received from you any 'previous offers' save such as are contained in your written communications to us; therefore your letter is not a confirmation of any previous offer or offers.

"Referring to the proposition contained in the second paragraph of your said letter, it is hereby rejected.

"Referring to the proposition contained in the first paragraph of your said letter, we refer you to our letter and wire to you of date the twenty-sixth day of June, and advise you that we will take the

4650 odd tons automobiles and parts which you mention, to be immediately delivered alongside S. S. 'CACIQUE,' as fast as vessel can load at the rate of thirty-five dollars ($35.00) per ton of forty (40) cubic feet measurement for shipment to Wellington, New Zealand, and Sydney, Australia, as indicated on the packages, and hold you strictly responsible for all damages, including demurrage, which we may ultimately sustain by reason of breach of your contract with us of date February 25, 1916.

"By taking this quantity of automobiles, less than the quantity which you contracted to deliver, at the rate of thirty-five dollars ($35.00) per ton of forty (40) cubic feet measurement, which is lower than the rate which you contracted to pay for the whole amount contracted for, we do not accept such smaller quantity at such lower or any rate as a full satisfaction of said contract of February 25, 1916, but only for the purpose of minimizing damages; and by the acceptance of such smaller quantity we do not in any way release or waive any damages or demurrage due to breach of your contract.

"We do not admit, and on the contrary deny, that thirty-five dollars ($35.00) per ton of forty (40) cubic feet measurement is 'going rate.'

"Very truly yours,

"(Sgd.) W. R. GRACE & CO.

"G. H. CARTER,

"Sub-Manager." [165]

Mr. McCUTCHEN.—Let me suggest: There really won't be any issue between us, will there, as to the freight which the steamer did carry on its outward voyage, and as to the freight which she recovered or which was paid for that outward voyage?

Mr. HENGSTLER.—I don't know if there is any issue between us. That depends upon the position which you take.

Mr. McCUTCHEN.—I do not think so. I am inclined to think a memorandum could be prepared. You say in answer to one of the interrogatories propounded to you that she received freight from a number of shippers, and if you will prepare a memorandum showing what that freight was and the amount paid you by each shipper, I think we will take your assurance for it.

Mr. HENGSTLER.—All right. I thought Mr. Williamson, himself, desired to have that correspondence in.

Mr. WILLIAMSON.—No. As far as we are concerned, you can put it in or not, and let the reporter copy it without taking the time to read it.

Mr. HENGSTLER.—With your Honor's permission, that may be done. The further correspondence upon the subject, throwing light upon the entire transaction, is a letter of—

Mr. McCUTCHEN.—No, no. I understand his Honor has limited that to the introduction of letters for the purpose of minimizing the damages.

(Testimony of G. H. Carter.)

Mr. WILLIAMSON.—I just meant this bunch of letters that you were speaking of.

Mr. HENGSTLER.—Of course, that is one of the objects of offering it; I do not see how your Honor is going to segregate from it any statement made by either party in the correspondence; it will throw light upon what—

The COURT.—I could not tell that, Doctor, until I saw the [166] correspondence. Of course, if one of them should have written to the other, "I admit that this contract meant so and so, and that I misunderstood it," if you have a letter of that kind, of course, it is admissible.

Mr. HENGSTLER.—Well, I think it is proper for that.

The COURT.—I cannot pass on the correspondence in the dark. I don't know what it is at all.

Mr. McCUTCHEN.—I think Doctor Hengstler will state to your Honor that there is not any such letter as you suggest.

The COURT.—Of course, I stated that very broadly. I mean any letter that would throw any light on it, any admission against interest, anything of that sort; anything that would be admissible under the general rule of evidence.

Mr. HENGSTLER.—I think there is enough in the correspondence so that I will offer it for all purposes.

Q. What is the next letter in the correspondence?

A. You might look at this and see which one you refer to.

(Testimony of G. H. Carter.)

Q. What is the date of the next letter, and by whom was it written, and to whom was it addressed?

A. The letter of Mr. Williamson dated July 7th.

Mr. McCUTCHEN.—May I look at it? (After examination.) I would like your Honor to look at this letter. We have no objection to the first two paragraphs of it, but we do object to the rest of it, because it seems to be a discussion as to what the relative rights and obligations of the parties prior to the writing of the letter were.

The COURT.—That is just the matter that has been developed here in court, that is contained in this third paragraph, and that is what we are fighting about here, isn't it?

Mr. McCUTCHEN.—I return to my suggestion of a while ago: [167] It seems to me if counsel will make a list of the shippers, with the quantity of freight shipped by each, and the amount recovered from each, we will have no difficulty in agreeing upon it. That could be done on half a page of paper.

Mr. HENGSTLER.—My purpose in offering this correspondence is for what it is worth, to throw light upon the whole transaction, not merely for the purpose of minimizing damages. I do not see why there should be any objection to it.

Mr. McCUTCHEN.—My objection is that it is not addressed to the matter to which his Honor said he would limit this correspondence, that is to

(Testimony of G. H. Carter.)

say, minimizing the damages; it is long after the suit was brought.

Mr. HENGSTLER.—There is nothing in that correspondence that I am not willing to lay before the Court, and I do not really see why there should be anything in that correspondence that you would not be willing to lay before the Court.

Mr. McCUTCHEN.—I do not see the force of that sort of argument; if our objection is well taken, the letter ought to be excluded; if the objection is not well taken, it ought to be admitted.

The COURT.—The objection will be overruled.

Mr. HENGSTLER.—Q. Will you read the letter?

A. It is a letter from Mr. Williamson to W. R. Grace & Co., dated July 7th. (Reading:)

"July 7th, 1916.

"W. R. Grace & Co.,

"San Francisco, Cal.

"Dear Sirs:—

"Please advise us immediately when you propose to load the 4650 tons of automobiles which we tendered you for transportation [168] at $35. per ton as per our letter of July 5, 1916, and which you agreed to transport at that rate per steamer 'Cacique,' as per your letter of July 6, 1916.

"Although we have had 29 cars of automobiles on your dock, ready for loading by you, we note that you have not yet begun loading, and we are unable to place the remainder of the shipment on your dock for want of space. Our offer and your

(Testimony of G. H. Carter.)

acceptance provided for immediate loading, and we must know at once your intentions in the premises.

"We note that you propose to hold us strictly responsible for damages, etc., as per your letter of the 6th instant, but you understand, of course, that we deny all responsibility or liability under what you designate as the contract with you of date February 25, 1915, and that our agreement with you as expressed in our letter of July 5th, and yours of July 6th, is entirely independent of any such alleged contract.

"Yours truly,

"FORD MOTOR COMPANY OF CANADA, LTD.,

"By W. F. WILLIAMSON."

Q. What was your answer to that letter, Mr. Carter?

A. The letter of July 8th from W. R. Grace & Co. to Mr. Williamson. (Reading:)

"July 8th, 1916.

"Mr. W. F. Williamson,

"Merchants National Bank Bldg.,

"City.

"Dear Sir:—

"Referring to your letter of July 7th:

"Would advise that we instructed yesterday the Southern Pacific Railroad to deliver immediately to Pier #39 balance of 4650 tons automobiles covered by your tender and part of the cars have already been delivered to [169] the dock and are now being unloaded.

(Testimony of G. H. Carter.)

"Steamer will commence loading your cargo immediately after it has been assembled on dock.

"Yours very truly,

"W. R. GRACE & CO.

"Sub-Manager."

Q. What was the next communication you received?

A. Letter of July 10th from Mr. Williamson to W. R. Grace & Co. (Reading:)

"July 10th, 1916.

"Messrs. W. R. Grace & Co.,

"332 Pine Street, San Francisco, California.

"Dear Sirs:

"Your letter of July 8th was delivered on Saturday afternoon after business hours. We are now informed that the Steamer 'CACIQUE,' instead of fumigating, cleaning holds and immediately commencing the loading of our cargo following the completion of the discharge of her inward cargo, was, late Saturday afternoon, sent to drydock for the purpose of effecting repairs to hull and machinery.

"We again request that you notify us at once on what date you will commence to load our cargo if the same is to be shipped on the 'Cacique' so that we may determine whether, in view of our sales agreements and other obligations, we can await this new delay which it is obvious the drydocking of the 'Cacique' will entail.

"We note your instructions to the Southern Pacific Company and beg to state that we cannot,

(Testimony of G. H. Carter.)

without definitely knowing your plans, permit the disposition of cargo to different docks, from which we could not ship by other vessels. We are, therefore, instructing the Southern Pacific Company to immediately stop the movement of our goods to Pier 39 until further advices from us. [170]

"Yours very truly,

"FORD MOTOR COMPANY OF CANADA, LTD.

"By W. D. WILLIAMSON."

Q. What was your answer to that letter?

A. July 10th, a letter of Grace & Co. to the Ford Motor Company.

Mr. McCUTCHEN.—I do not see that any of this correspondence beyond the first letter has any bearing upon the question of minimizing the damages, your Honor.

The COURT.—Is that an objection, again?

Mr. McCUTCHEN.—Yes.

The COURT.—Overruled.

A. A letter of July 10th from Grace & Co. to the Ford Motor Co. of Canada: (Reading:)

"July 10th, 1916.

"The Ford Motor Company of Canada,

"c/o Mr. W. F. Williamson,

"Rm. 1112–1119 Merchants National Bank Bldg.,

"City.

"Dear Sirs:

"Replying to your letter of today's date, received this P. M.:

"We would point out that the delay in loading steamer 'CACIQUE' has been due entirely to your breach of contract and your instructions to the Southern Pacific not to deliver your shipment to the vessel. We regret to note from your letter under reply that you have again instructed the Southern Pacific to stop delivery, as this will result in further delay.

"We beg to say that we have been and are now endeavoring in every way possible to fill 'CACIQUE' vacancy left by your breach of contract to deliver 6200 tons cargo. Your tender of 4650 tons leaves some 1550 tons of space to be filled by us as best we can in order to minimize damages.

"The writer on several occasions advised Mr. Sutro, and we believe also advised you, that in view of the delay to vessel made necessary by your short tender and by [171] your stoppage of delivery of your shipment, which must be properly assembled on wharf alongside of vessel, we proposed to dock vessel and make sundry repairs which we had intended to effect in Sydney, thus further minimizing damages.

"We would point out that the ultimate sailing date of 'CACIQUE' has been and is in no way delayed by reason of this docking vessel for repairs referred to above; in fact it is manifest that when vessel commences loading on Wednesday, day after tomorrow, that further delay seems inevitable owing to the fact that you have again prevented your ship-

(Testimony of G. H. Carter.)

ment from being delivered by the Railroad Company.

"Yours very truly,

"W. R. GRACE & CO.,

"Sub-Manager."

Mr. HENGSTLER.—Q. What answer did you receive to that letter?

A. A letter of July 11th from the Ford Motor Co. of Canada, by Mr. Williamson, to Grace & Co. (Reading:)

"July 11th, 1916.

"Messrs. W. R. Grace & Co.,

"332 Pine Street,

"San Francisco, California.

"Dear Sirs:

"We have your letter of the 10th instant.

"On the understanding, which we draw therefrom, that your Steamer 'Cacique' will commence loading our cargo tomorrow (Wednesday) and will prosecute such loading and her voyage with due diligence, we will direct the Southern Pacific Company this morning to continue the delivery of our cargo to Pier No. 39, as per your request. Our action in temporarily stopping the delivery yesterday afternoon until we could learn your definite loading date [172] was a reasonable precaution which could not in any way have delayed the loading of your vessel, which is still in dry dock, while you have had her cargo delivered in part at different piers. One of these piers, No. 26, is literally blocked with the inward cargo of the vessel.

"We are advised by Mr. Sutro that you mentioned repairs to him on only one occasion and then by telephone on Friday, June 30th, after our conference in the afternoon of that day, looking toward a settlement of the difference between yourselves and the Ford Motor Company of Canada, Ltd., growing out of what you term the 'contract of February 25, 1916.' You asked him whether the delay of a day or two to make repairs would interfere with the proposed settlement and he replied that he thought it would not. We had no knowledge of your purpose to dry dock this vessel and were greatly surprised to learn that you had done so in view of your engagement of July 6th for the shipment of our cargo.

"Noting the first two paragraphs of your letter of July 10th, we most emphatically deny that we breached any contract of carriage with you, either by our directions to the Southern Pacific Company, or in any other manner. No action of ours was responsible for your delay in loading the Steamer 'Cacique.' As you well know, the vessel was not ready to load her cargo in the month of June and in fact is not yet ready to do so.

"We note your efforts to obtain further cargo for this vessel but while we hope you can do so for your own interests, the loading and carriage of the 4650 tons tendered by us and accepted by you must

(Testimony of G. H. Carter.)

begin tomorrow, Wednesday, and proceed with due diligence.

"Yours very truly,

"FORD MOTOR COMPANY OF CANADA, LTD.

"By W. F. WILLIAMSON." [173]

Q. Was there any further correspondence after that? A. Apparently not, from this record.

Q. When did the loading of this substituted cargo commence?

A. I don't know at all other than it would appear from this correspondence—

Mr. McCUTCHEN.—I object to that.

Mr. HENGSTLER.—It commenced on July 10th; I believe that is admitted, is it not?

Mr. WILLIAMSON.—No, it commenced on July 12th, after she came back from the drydock. That is set forth in the answer to the interrogatories.

Mr. HENGSTLER.—July 12th; I was mistaken; I meant July 12th; that is admitted, that she commenced to load at that time?

Mr. WILLIAMSON.—July 12th.

Mr. HENGSTLER.—That is all.

Mr. McCUTCHEN.—Doctor, you were requested to produce any communications that Grace & Co. had from its agents in Hongkong, or Shanghai, or Vladivostok, or from the captain of this ship, prior to the arrival of the ship here on the 27th of June. Have you any such?

Mr. HENGSTLER.—I have not received any such request. I was not served with that request.

(Testimony of G. H. Carter.)

Mr. GRIFFITHS.—It was served at your office last night.

Mr. HENGSTLER.—I have not seen it, if it was in my office.

Mr. GRIFFITHS.—I talked with Mr. Single about it last night.

Mr. HENGSTLER.—What time last night?

Mr. GRIFFITHS.—After the adjournment of court.

Mr. HENGSTLER.—I did not return to my office until half-past [174] seven.

Mr. McCUTCHEN.—It was not called to your attention?

Mr. HENGSTLER.—It was not called to my attention.

Mr. McCUTCHEN.—Will you produce it?

Mr. HENGSTLER.—We will produce anything that Mr. Carter has got in his office. What is it you want?

Mr. McCUTCHEN.—I will proceed with the examination of the witness now.

Cross-examination.

Mr. McCUTCHEN.—Q. When did you first know the date, or the approximate date, on which the "Cacique" would arrive in San Francisco from its voyage to Vladivostok?

A. I do not know, but we will have records which will show, presumably in a cable.

Q. From whom?

A. Either from the captain or agent.

(Testimony of G. H. Carter.)

Q. Would that probably be in a cable, or in a wireless?

A. Either one or the other, probably a cable.

Q. Did the ship have a wireless apparatus?

A. Yes.

Q. This is speculation to some extent, but from what port would that cable come—from Honolulu?

A. No; we would first receive a cable when the vessel sailed from China, and either that cable would give the captain's expected date of arrival, or we would figure from that sailing date when he should arrive.

Q. To whom did the captain report when the ship reached port here on the morning of the 27th?

A. You mean who to in the office?

Q. Yes.

A. He would report to the steamship department.

Q. Did he report to you? A. No.

Q. Did you know he had arrived?

A. Yes. [175]

Q. You knew that on the morning of the 27th?

A. Yes.

Q. There had been some rather sharp controversy between you and the Ford Company with reference to your obligations under this contract, had there not? A. Yes.

Q. So you were naturally concerned with the time when the ship would arrive, and you had that in mind up to the time when she actually arrived?

A. Yes.

Q. Did you learn immediately after the captain

(Testimony of G. H. Carter.)

or the ship reached port that she had met with some damage on her return voyage?

A. Within a very short period I heard, probably a day or so.

Q. Did you not hear on the 27th?

A. Possibly.

Q. Did you not hear almost immediately after the ship arrived?

A. No, I do not think so. I might possibly have heard. But the damage was not such that it would make it imperative that I would be advised.

Q. Did you learn subsequently what the damage was? A. Yes.

Q. You state in one of your letters written after this libel was filed that the damage was of a nature that you would have repaired when she was in Sydney or Australia?

A. Yes, we were arranging to do that.

Q. You were arranging to do that? A. Yes.

Q. Would you have allowed that ship to go out of this port in the condition she then was?

A. Yes.

Q. Would Lloyd's have allowed her to go out?

A. If Lloyd's wouldn't we couldn't; in other words, we would have to have a seaworthy certificate for her to said.

Q. Was she afterwards classified by Lloyd's?

A. Lloyd's must have passed on the repairs when they were made here.

Q. Did you at any time call in Lloyd's?

(Testimony of G. H. Carter.)

A. That I don't [176] remember; I have no doubt we did.

Q. Did you get a survey from Lloyd's representative here?

A. I am sure we did; if we called them in we certainly did get the survey.

Q. Did you not know on the morning of the 27th of June that that vessel could not take on a pound of freight during the month of June?

A. No. The difficulty was this: Normally, we could have discharged that cargo on the 27th, 28th and 29th, in time to commence loading on the 30th, but with this strike which had come up within a few days prior to the arrival of this ship, I am not at all certain that that could have been done.

Q. Are you in doubt about that? A. Yes.

Q. You think you might have been able to begin loading on the 30th? A. Yes.

Q. Now, I understand you to say that the words "June loading" mean that you could begin to load at the last minute of the last day of June?

A. Well, that is a point which has been argued among shipping men for a long time.

Q. No, I am not asking you that. You have told us what those words mean.

A. Yes, if you start loading on the last date you make a June loading; that is as compared with a June shipment, which means that the vessel must complete within the month stated.

Q. You stated, in answer to his Honor, as I understood you, that if you began loading on the last

(Testimony of G. H. Carter.)

day of June you complied, in that respect, with the contract? A. Yes.

Q. That means the last minute of the last day of June, does it?

A. It means some time on the last day of June.

Q. Will you answer my question, Mr. Carter? You are here as an expert on that subject. I ask you if that means the last [177] minute of the last day of June?

A. It means to commence loading—

Q. Won't you answer my question and then make your explanation?

A. Yes; it means to commence loading during any time in June.

Q. On the morning of the 27th of June, and before this libel was filed, did you not know that the "Cacicue" could not take on a pound of freight, even up to the last minute of the last day of June?

A. No.

Q. Did developments subsequently take place which satisfied you that the ship could not take on any freight before the last minute of the last day of June? A. Yes.

Q. You say that on account of the pendency of this strike—I think nothing has been said about a strike heretofore, because Mr. Moore said he knew nothing about it; tell the Court, please, what the strike condition was?

A. It was one of our longshoremen's strikes, and the conditions were bad, as they always are on such occasions; on the other hand, we were willing to get

(Testimony of G. H. Carter.)

sufficient men to discharge this cargo during these three days which we had, if possible.

Q. "These three days which we had": That is to say, under this contract as you interpret it?

A. No, not as I interpret it, but as you interpret it.

Q. As we interpret it? A. Yes.

Q. You have said that you could begin on the last day of June.

A. Not under this contract; my position is that we could have begun on any day in July, or even later, under this contract.

Q. Or August?

A. Time, of course, must be reasonable. I should say that beyond sixty days, in my opinion, would be unreasonable.

Q. You said a while ago you understand the words "June loading" [178] to mean to begin loading in June? A. Yes.

Q. Do I understand you now to say you do not mean that?

A. No. The words alone, "June loading," mean to begin loading in June; but in this contract the words "June loading," in my opinion, do not mean to begin loading in June, it simply shows the loading of the vessel.

Q. In other words, the words "June loading" in this contract mean something different from what they would mean in any other contract?

A. Not any other, but in many others.

(Testimony of G. H. Carter.)

Q. Most others—most others that you know anythink about?

A. "Most others" is quite correct; but the "all most others" that you refer to, the time would also be shown in the contract, the lay days the vessel would start to load, and the date of cancellation.

Q. But the house of Grace & Co., when it drafted this contract, did not think it necessary to put any of those contingencies in the contract, or to provide for any of those contingencies in the contract?

A. No; the contract was drawn at a time when all business, particularly in shipping, was as brief as possible; you will rarely see a contract as brief as that contract before you.

Q. Was it also brief as to demurrage?

A. It is brief in language, perhaps not in amount.

Q. Then this contract differed from the ordinary shipping contract, as I understand it?

A. It differs from many.

Q. Answer the question, please. This contract differs from the ordinary shipping contract, as I understand it? A. Yes, it does.

Q. This is the first contract of this kind that you ever saw worded as this contract is?

A. Yes. [179]

Q. You say that you tried to discharge the cargo within these three days which we had, if possible; What was it that induced you to try to discharge the cargo witin those three days?

A. For the reason that the Ford Motor Co. were to base their case, their argument with us, precisely on

(Testimony of G. H. Carter.)

that point, and while I personally did not believe that their position was correct, I at the same time wanted to avoid that point if possible.

Q. You continued your effort to discharge the cargo, didn't you?

A. Not beyond a very short—not beyond the very first day; I think by that time the split had occurred between us, and we knew it was impossible to go ahead at all.

Q. And then you let up in your effort to discharge the cargo?

A. Yes; in other words, we did not do the work which we could have done had the dispute not arisen.

Q. How many tons did you discharge the first day?

A. I have no idea. I have not any of the figures in my head at all.

Q. Do you remember verifying some answers to interrogatories in this case? A. Yes.

Q. You remember the fact, do you? A. Yes.

Q. Let me ask if you did not answer this question as follows:

"Q. What was the total quantity of cargo discharged from said steamer on each of the days during which said cargo was unloaded?

"A. There is no record in existence; it is therefore not possible to answer this question for each day of the discharge; an approximate calculation of the average discharge per day gives 643 tons; the actual discharge was slow and intermittent, on ac-

(Testimony of G. H. Carter.)

count of the prevailing strike of longshoremen and the consequent necessity of employing incompetent nonunion labor; had there been no strike, and competent stevedores available, [180] the steamer could have been completely discharged before June 30.''

A. Yes.

Q. You say now that you let down in your efforts to discharge the steamer? A. Exactly. This is—

Q. One moment: Do you say now you let down in your efforts to discharge the steamer?

The COURT.—Let him answer the question.

A. Exactly. We could have secured more men had it been necessary, but in my opinion we could not have secured enough men to have completed that discharge in June, on account of this strike.

Mr. McCUTCHEN.—Q. Then we may take it for granted in this case that with all the energy you could have displayed you would not have been ready to take freight on board that steamer before the end of June?

A. Not with the steamer with clean holds; we could have commenced loading in her 'tween-decks, which had been discharged, which procedure I had considered.

Q. Was the steamer subsequently fumigated?

A. Yes.

Q. Could you have begun loading her before she was fumigated?

A. Yes, we could fumigate with cargo on board.

(Testimony of G. H. Carter.)

Q. Do you know what material is used for fumigation? A. Cyanide.

Q. Would you put on board a shipment of automobiles and subsequently use cyanide of potassium for the fumigation of that part of the ship in which the automobiles were?

A. Yes, we were going to.

Q. Have you ever known that to be done?

A. No.

Q. Could your men have been working there while that fumigating process was going on?

A. No. [181]

Q. Then you would have suspended the loading operations entirely, would you, while that was being done?

A. Either have done it after complete loading, provided we were satisfied there could be no damage, or it would have been necessary to suspend loading.

Q. How much time was required for the fumigation, and when did the fumigation take place?

A. If my memory is correct, about overnight is required for fumigation by the cyandide process; I should say half a day. I may not be correct.

Q. What was the condition of the ship with reference to cargo on board at the time the fumigation actually took place? A. That I do not know.

Q. Don't you know there was no cargo on board when she was fumigated?

A. I would infer there was no cargo on board.

Q. And don't you know that that is the usual

(Testimony of G. H. Carter.)

course? A. Yes, it is the usual course.

Q. When did she go to the drydock?

A. I think, from reading the few letters there a moment ago, it was July 5. It was Saturday. It speaks of her going on Saturday.

Q. Is it not the fact that she went to drydock on the 8th? A. That I cannot tell.

Q. Did not the unloading continue as rapidly as it was possible for you to proceed with it from the day when it commenced up to the time that she went into drydock?

A. We could have secured more men, but it was doubtful at that time whether it would have been of any particular advantage.

Q. Why?

A. Men were scarce; they were needed by all the steamship companies, and unless we were making some vital drive for a particular point, we did not want to take more than our proper quota of men from our associate companies. [182]

Mr. McCUTCHEN.—I may suggest to your Honor, and I think Doctor Hengstler will agree, that the answers to the interrogatories, as to when the ship went to drydock, show that she went on the 8th of July.

Mr. HENGSTLER.—Well, whatever is stated there will be taken as correct. If you say that that is what is stated there, that that is what the record shows, that will be taken as correct.

Mr. McCUTCHEN.—Q. What happened, as between you and the Ford Company, after the ship

(Testimony of G. H. Carter.)

arrived here on the morning of the 27th and the filing of this libel on the afternoon of the 27th?

A. What happened—I don't understand the question.

Q. Did you come in contact with anyone representing the Ford Company between those hours?

A. That I don't remember.

Q. Is it not a fact that after a consultation with the counsel for Grace & Co., and after advising the counsel that you could not load a pound of freight on that ship during the month of June, that you concluded to file this libel? A. No.

Q. You did not know, then, at the time you filed the libel, that you could not load any freight in June?

A. We did not know that it would be impossible to load freight, part of the cargo, in the 'tween-decks, for instance. I had despaired that we would be able to discharge the vessel with the men that we probably could get.

Q. Were you in doubt, on the 27th of June when you filed the libel, that you would be able to load any cargo on the ship during the month of June?

A. No; we expected to load part of it during the month of June.

Q. At the time you filed the libel? A. Yes.

Q. How much did you expect to load during the month of June, at the time you filed the libel?

A. Very little. [183]

Q. Well, as an outside quantity, how much?

A. My idea was that we would—

(Testimony of G. H. Carter.)

Q. Answer the question, please. Well, you are answering it, go ahead.

A. My idea was that we could clean out possibly two 'tween-decks of the vessel of the inward cargo, and load those 'tween-decks with these Ford cars before June 30th, and establish this point of June loading.

Q. Well, that would have been—without wanting to be offensive—just a piece of camouflage, wouldn't it?

A. I have never seen it done before, and whether in would be effective, I am not at all sure.

Q. That would, at most, taking your opinion of it, have been a pretense at performance, and that only, wouldn't it? A. I would hardly say that.

Q. Well, it would not have been in your opinion, as you look at it now, a genuine beginning of loading, would it?

Q. Do you mean legally, or actually.

Q. No, I mean in your view of it, looking at it as a common sense proposition.

A. It would be a genuine loading, providing you could have completed loading by doing so.

Q. Don't you know that if you had tried anything of that kind your loading would have been delayed?

A. Not necessarily delayed, but it is very probable that it would not have been increased.

Q. Then if it could not have been increased, it would have been a pretense? A. Exactly.

Q. When the ship arrived on the morning of the

(Testimony of G. H. Carter.)

27th, did not the captain tell you she was in a leaky condition? A. No.

Q. He did not?

A. No; I don't remember seeing the captain for several days.

Q. Didn't your dock superintendent tell you she was in a leaky [184] condition? A. No.

Q. Did anybody?

A. I heard at some time, I cannot place the date, whether it was within those first few days that she arrived, or not, that the vessel had leaked somewhat in her forepeak; this is from memory entirely now, and I have not looked it up and I am not certain of it, but as I remember it there was a slight leak reported in her forepeak, which leak normally would be very little to a shipping man; a leak in a forepeak amounts to practically nothing, provided it is slight, only.

Q. Don't you know that Lloyd's sent her to the drydock for that leak, and they would not have given you a certificate for the ship to go out on another voyage in her then condition? A. No.

Q. Did you talk with anyone representing Lloyd's on that subject?

A. No, but I must have discussed it with the head of our Steamship Department.

Q. Who is he?

A. Probably a man named Eggers. We have had several different steamer men. I cannot be sure.

Q. Well, you discussed it with somebody, and you

(Testimony of G. H. Carter.)

don't know now who that somebody is: Is that right?

A. Yes. Anyway, it would be the man who would naturally bring it to me in the office.

Q. I think that that must be very apparent, Mr. Carter. You cannot aid us in telling us who that man is?

A. I can find out later who that man would be.

Q. Were you advised or told by your dock superintendent, on the day on which this vessed arrived here and before you filed this libel, that she had sprung leaks on her return voyage from Hongkong?

A. That I don't remember. [185]

Q. For what reason did this ship go to drydock?

A. She went to drydock to make repairs to cover the damage which had happened on her voyage over here.

Q. When was it first determined that she should go to drydock?

A. I cannot remember what decided us to drydock the steamer here finally, instead of at Australia.

Q. Don't you know that it was common report on the dock where this steamer was discharging, from and after the moment that she arrived, that she would have to go to drydock before going out on another voyage? A. No.

Q. You received, did you not, from the Ford Motor Co. of Canada, during the month of June, a letter in which that corporation stated that they understood you had taken out a clearance for this vessel in July? A. Yes.

(Testimony of G. H. Carter.)

Q. Was that true, that you had taken out such a clearance?

A. No, we would not take out a clearance so far in advance.

Q. Had you determined at that time, about the time of the receipt of that letter, that the vessel would not go out until July? A. I think so.

Q. What date in July?

A. I do not remember; it would be an early date.

Q. When was it, Mr. Carter, that you first reached the conclusion in your own mind that this ship could not take on any substantial quantity of cargo during the month of June?

A. By "substantial," do you mean any? My only object was to take on, if possible, enough cargo to cover the point which was being raised by the Ford Motor Co., that she must commence loading in June. That amount of cargo would need be, in my opinion, very little.

Q. I think I asked you to state the number of tons, and I do [186] not think you answered that question; will you now tell us the number of tons which should be on board in June in order to cover your obligation in that respect?

A. I don't think it is a matter of tons, I think a very few packages would do it.

Q. Then your intention was to put on very few packages? A. Yes; as many as possible.

Q. Well, as a maximum, how many?

Mr. HENGSTLER.—He said before, Mr. McCutchen, two 'tween-decks.

(Testimony of G. H. Carter.)

Mr. McCUTCHEN.—Q. As a maximum, how many packages?

A. I should say that two 'tween-decks clear, we would put on that ship several hundred tons.

Q. On the 28th day of June, and up to the end of that period, you had not been in a condition to load any freight on to the "Cacicue," had you?

A. No.

Q. And yet, on the 28th you wrote a letter to Ford & Co. stating that they had delayed the ship in its loading, and were therefore liable for demurrage at $3,000 a day, didn't you? A. Yes.

Q. Why did you write that letter?

A. Because they had delayed the ship. A vessel's cargo must be delivered in time to properly segregate it so that it can be properly loaded.

Q. You had told them in a previous letter, had you not, that they should begin to deliver their cargo at the dock on the 2th and have it completed by the 29th? A. Yes.

Q. Now, you knew when you wrote the letter of the 28th that it was extremely doubtful the ship would be able to take on a pound of freight in June, did you not?

A. Not a pound, I would not say that.

Q. Well, any substantial quantity, we will put it.

A. Not any more than several hundred tons, yes. [187]

Q. At that time there were on the dock in the neighborhood of 2500 of 2600 tons of Ford freight, were there not?

(Testimony of G. H. Carter.)

A. That I don't remember, but I think not.

Q. I am corrected. I am told 1500. You think there were not 1500 tons there?

Mr. HENGSTLER.—It was not 1500 tons, either.

A. I think not. It seems to me it was a much smaller quantity.

Mr. McCUTCHEN.—Q. How much?

A. My recollection was there was but a very few hundred tons delivered.

Q. You allege in your libel in this case, which you verified, that the Ford Company had on the 23d or 24th delivered 1100 tons on the dock, do you not?

Mr. GRIFFITHS.—1100 packages?

Mr. McCUTCHEN.—1100 packages.

A. Possibly; I don't remember.

Q. You were the representative of Grace & Co. in all this business, were you not? A. Yes.

Q. You knew what you were doing when you verified this libel, didn't you? A. Yes.

Q. Now, bearing in mind that you have stated that you would only have put on a few hundred tons during the month of June, I ask you whether you don't know that there were many more than a few hundred tons on the dock, placed there by the Ford Company, prior to the 26th of June? A. Yes.

Q. Then I ask you again, what did you mean in your letter of the 28th by saying the Ford Company had delayed you?

A. I mean that they had delayed us; in other words, the cargo could not be loaded direct from cars into a steamer and give that steamer the requi-

(Testimony of G. H. Carter.)

site loading; in other words, a cargo should arrive prior to the date of loading, in sufficient quantity to enable it to be [188] segregated and loaded properly into the ship.

Q. Going back again, you know you had asked for this cargo to be there by the 29th? A. Yes.

Q. So when you filed the libel on the 27th the Ford Co. had still 48 hours, or approximately that, to comply with your request to deliver the cargo?

A. They must have.

Q. They must have? A. Yes.

Q. And none the less you filed the libel on the 27th? A. Yes.

Q. You say you had not been told by your counsel in your interviews with him, or that you had not appreciated, yourself, that Grace & Co. were in a delicate situation, and was itself in a situation where it might be called upon for the payment of damages for breach of this contract? A. No.

Q. That never was suggested to you?

A. Not in the least. I do not see how we could have been called upon for damages.

Q. When you filed this libel—I call your attention to the signature "J. H. Carter."

A. Yes, that is mine.

Q. To the verification of this libel; that is yours?

A. That is mine.

Q. You knew what you were signing when you signed the verification? A. I did.

Q. You read the libel before you signed it?

A. Yes.

(Testimony of G. H. Carter.)

Q. You stated that at the time you filed the libel there were 1100 packages belonging to the Ford Motor Company on the dock and ready for shipment thereon, that is, for shipment on the steamer "Cacicue"?

Mr. HENGSTLER.—Is there any "1100" in there it is 1094, isn't it?

Mr. McCUTCHEN.—You changed it to 1100, Doctor.

Mr. HENGSTLER.—It is not changed in my copy, so I didn't know.

Mr. McCUTCHEN.—There is no notation, but, of course, it was [189] changed before the trial.

Mr. HENGSTLER.—It does not make any difference.

Mr. McCUTCHEN.—Read the last question. (Last question read.)

Q. You mean for shipment on the steamer "Cacicue"? A. Yes.

Q. Can you give the Court some impression about how many measurement tons, if I may use that expression, were represented in that 1100 packages?

A. Personally, I do not know, but it can be readily figured.

Q. You have no impression about that?

A. No, none.

Q. Would you say that that probably represented at least 1500 tons?

A. It might; if the packages measured over 40 cubic feet a ton, yes, it would.

Q. Would you say there were at least that?

(Testimony of G. H. Carter.)

A. Let us say that there were.

Q. I do not care to put it that way. Will you say there were at least 1100 tons?

A. No, as I have no idea of the size of those packages.

Q. Was that as much freight as you would have put on the "Cacicue" for the purpose of making this pretense which you have spoken of?

A. It was you that spoke of the pretense.

Q. I do not use that offensively, Mr. Carter.

Mr. HENGSTLER.—He wanted to meet your own views.

Mr. McCUTCHEN.—Is that as much freight as you would have put on the "Cacicue" in order to make this showing of a commencement of loading?

A. Yes.

Q. And more, is it not? A. Very probably.

Q. It is suggested to me by my associates to again ask you about how many tons you could have put in the 'tween-decks that you have spoken of?

A. My memory is not good enough to tell you that. [190]

Q. At any rate you know it was a quantity much smaller than that represented by this 1100 packages?

A. I should say this: That while we probably could put this entire quantity into all her 'tween-decks, that doubtless all her 'tween-decks would not have been empty. In other words, I think that was sufficient cargo to have loaded in that ship in June.

Q. Now, notwithstanding that, you sat down and

(Testimony of G. H. Carter.)

deliberately indicted a letter to the Ford Company stating they had delayed the loading of the "Cacicue," did you not?

A. Yes. As I have explained twice, they delayed the loading of the cargo in not having the cargo there a sufficient time prior to the loading.

Q. Did you go down to the ship's side at any time during that unloading operation? A. No.

Q. Do you know to what extent that dock was strewn with cargo? A. No.

Q. While the unloading was going on?

A. No, I did not see it, but I could imagine it.

Q. What was the occasion for the fumigation of this vessel?

A. If my memory is correct, it was a necessary port ruling that she must be fumigated.

Q. Because of the port from which she had come?

A. Yes.

Q. There was no escaping from it?

A. No, not with any propriety.

Q. When these packages were delivered by the Ford Co. on the dock, for what purpose were they delivered? A. To be loaded on the ship.

Q. On the "Cacicue"? A. Yes.

Q. Referring again to your letter of the 28th, stating to the Ford Co. that it would be liable for demurrage of $3,000 per day, what was the purpose of writing that letter?

A. It is always [191] necessary to establish demurrage to write to the shipper; in fact, it is a regular custom.

(Testimony of G. H. Carter.)

Q. There was offered here yesterday, Mr. Carter, a letter written on the 26th of June, in which was set forth a telegram sent to the Ford Motor Co., of Canada, by Grace & Co., on that day. Mr. Moore said that he wrote that letter pursuant to the instructions of some superior. You were his superior, were you not? A. Yes.

Q. So that you knew about the writing of the letter of June 26th, didn't you?

A. I could tell if I saw it. (After examination.)

A. Yes, I know this wire.

Q. When you sent that wire, did you know that there were 1100 tons of freight on the dock—1100 packages?

A. It is quite probable, but we also knew that the Ford Motor Company had instructed the railroad not to deliver the automobiles, and the automobiles had been delivered by mistake by the railroad.

Q. They were, none the less, there?

A. Yes, they were there.

Q. Ready, as you say in your libel, to be loaded on a ship?

A. Yes, providing we were not prevented by the Ford Motor Co.

Q. You had not been prevented up to that time?

A. No.

Q. So that you knew at that time that the Ford Motor Co. had actually delivered 1100 packages, or thereabouts, of the freight which you in this telegram of the 26th of June demanded it should deliver?

(Testimony of G. H. Carter.)

A. Yes, but also knew it was delivered by mistake.

Q. That is, it was not intended as freight for the steamer?

A. No, it was not the intention of the Ford Motor Co. to give us that freight.

Q. And it was not received by you as freight?

A. It was received as freight.

Q. It was received as freight?

A. It was received as freight. [192]

Q. Then you had it as freight? A. We did.

Q. At the time you wrote the letter of the 26th, and at the time you filed the libel? A. Yes.

Q. And you thereafter, as set forth in this libel verified by you, proceeded to foreclose a maritime lien upon that 1100 packages of freight?

A. Yes. The railroad at that time was requesting us either, as I remember it, to return or permit them to take away that cargo; they claimed they had made an error in delivering it to us; we naturally, when we placed our libel, libeled everything we could find of Ford.

Mr. McCUTCHEN.—Your Honor understands that so far as this feature of the case is concerned, this is a libel *in rem*. The respondents are the Ford Motor Co. of Canada, Ltd., a corporation, and certain automobiles and parts in packages.

Mr. HENGSTLER.—It is a libel in foreign attachment and a libel *in rem,* too.

Mr. GRIFFITHS.—A libel *in rem* and foreign attachment.

Mr. HENGSTLER.—I don't know what differ-

(Testimony of G. H. Carter.)

ence there is. A libel on any foreign attachment is a libel *in rem.*

Mr. GRIFFITHS.—A writ of attachment—

The COURT.—What is this discussion about? Let us finish the testimony.

Mr. HENGSTLER.—I don't know what the point is.

Mr. McCUTCHEN.—Q. You suggested about some information with reference to the railroad company. Can you state to us in what way, I mean specifically, that delayed your operation or interfered with your loading of this Ford cargo?

A. Do you mean the loading of the entire cargo?

Q. Any part of it.

A. Or the loading of part?

Q. Any part of it.

A. The loading of any part of the cargo [193] was not delayed, provided we could have loaded without restraint that cargo which was on the dock.

Q. What did the railroad company do between the date of the delivery of that cargo on the dock and the time when you filed this libel, which interfered in any degree with the loading of those packages on the steamer?

Mr. HENGSTLER.—May I refresh the witness' recollection with reference to that?

A. I think they wrote us a letter.

The COURT.—If you have some document there that will show it.

A. Here is a letter from Davis to the Southern Pacific.

(Testimony of G. H. Carter.)

Mr. McCUTCHEN.—Read my question.

(Last question repeated by the reporter.)

You have a letter there of *of* the 22d of June. You allege in your libel that that freight was delivered on the 23d and 24th of June. My question is, what was done between the date of the delivery of those packages and the filing of the libel?

A. We received a letter on June 27 or 28 from Mr. Herrin, of the Southern Pacific, enclosing this letter from the Ford Motor Co.

Q. Now, you say the 27th or 28th.

A. Yes. This is dated the 27th. I don't know when we got it.

Q. My question is confined to the time that intervened between the delivery of the packages—

A. (Intg.) Which was what date?

Q. (Continuing.) Was the 23d or 24th—

A. (Intg.) And the 27th?

Q. And the 27th, when you filed the libel.

A. I presume at that time we had this letter.

Q. You don't know whether you had or not?

A. I think the letter—I am very positive that the letter was to confirm several [194] telephone communications from the Southern Pacific.

Q. Do you know when that letter came to your office, by the way? A. No.

Q. I submit we ought to have that. You have a file with a stamp on it.

A. I think we can find the original showing when that came in.

Q. I think we ought to have that. You will have

(Testimony of G. H. Carter.)

time to get that during the adjournment.

Mr. HENGSTLER.—Ask him to the best of his memory, and he will give it.

A. Of course, it is rather difficult, this is 1916—this is supposed to be a complete file, and the originals of this file may be in our archives; it may take a little while to get it.

Mr. McCUTCHEN.—Q. We prefer that you endeavor to get it.

A. Yes, we will be glad to do it.

Q. When the ship left here for Australia, did she carry oil or water in her No. 2 deep tank, or No. 2 double bottom?

A. She undoubtedly carried oil in her deep tank; her double bottom, I am not sure; I suppose she carried oil there also. The records will show.

Q. Was it necessary for her to carry oil there in order to make the voyage to Australia?

A. That I do not know.

Q. You don't know whether she would have had sufficient fuel to take her on that voyage to its end, unless she carried oil in her double bottom?

A. No, I do not know without looking up the records.

Q. Do you know whether, when she arrived here on the 27th of June, she could have carried oil in her double bottom?

A. No, but I infer that she could.

Q. You infer that she could? A. Yes. [195]

Q. Don't you know that she was permitted by Lloyd's surveyor to come from Hongkong to this

(Testimony of G. H. Carter.)

port only upon the understanding that she should not carry oil in that double bottom?

A. No, I don't remember.

Q. You don't remember that?

A. In fact, I am quite sure I never heard of it.

Q. Is not that embodied in an answer made by you to one of the interrogatories propounded to you?

A. Possibly, but I don't remember it.

Q. And being at the head of the shipping department of Grace & Co., you cannot tell us now whether that ship could have gone to Australia if she had not been able to carry oil in her double bottom?

A. As I remember it the vessel had—and this is from memory only—about 1,500 tons capacity in her deep tank, and I am quite positive that she needed additional space in her double bottom for that fuel.

Q. Did you learn, after the vessel arrived here, that on her voyage from Hongkong she did not carry oil in her double bottom?

A. Possibly, but I don't remember it.

Q. You might have learned that on the morning of the 27th, and before you filed this libel?

A. No, it is very unlikely.

Q. Very unlikely? A. Very unlikely.

Q. Is it very unlikely that everybody connected with Grace & Co. should have been ignorant about that?

A. Very possibly; in other words—

Q. Just a moment; I think I framed that ques-

(Testimony of G. H. Carter.)

tion so as to get a double negative there. I mean is it likely?

A. The captain of the vessel, of course, would know, and he undoubtedly would discuss it with our Steamship Department, who met the vessel.

Q. And he would do that very promptly after the vessel arrived, [196] would he not?

A. Probably.

Q. And the Steamship Department would notify you, as the manager?

A. In due course; I might not be notified for some days. I would be notified when the point was brought up as to whether or not repairs were essential for that vessel before she left port.

Q. Would the captain advise some one of your heads of department that Lloyd's had imposed, as a condition to allowing the ship to proceed on its voyage from Hongkong to San Francisco, that she should not carry oil in her double bottom?

A. Probably.

Q. And now do you say that the head of the department to whom that information came might not convey it to you for days?

A. He might not for some time. Normally, such advice would be received fairly promptly, but during the three years of 1916, 1917, and 1918, when there were abnormal business conditions, frequently points like that would not be brought to our attention.

Q. Mr. Carter, who is the man in Grace & Co. who could tell us about that?

(Testimony of G. H. Carter.)

A. The head of the Steamship Department.

Q. And who is he?

A. I think it was Eggers.

Q. Is he still with you?

A. No, he is with the Pacific Mail, I think: he is right in town. We can readily find out who the head of the Steamship Department was, and what the captain told him regarding repairs, if you want that point settled clearly; that will be very easy.

Q. You have said, as I understand you, that you would have allowed that ship to proceed on her voyage to Australia without having any repairs made upon her?

A. Yes, that was our understanding regarding the damage which she had suffered; in other words, the damage was considered so little that repairs were not necessary.

Q. You stated, in answer to one of these interrogatories, that [197] you would have had those repairs made in Australia, did you not?

A. Yes; and we were arranging to have them made there; in fact, we intended to.

Q. These answers to interrogatories were signed long after the ship had left here, were they not?

A. Yes.

Q. You must have known, before the ship left here, whether she could carry oil in her double bottom, didn't you? A. Yes.

Q. And you say that, assuming she could not carry oil in her double bottom, you would have allowed her to go to sea on a voyage to Australia?

(Testimony of G. H. Carter.)

A. I would have, provided her deep tank had been able to hold sufficient oil to take her there, and I have no recollection what it holds.

Q. Did you ever hear that the center line bulkhead of her deep tank was strained and had started?

A. Not that I remember, other than that may have been discovered when she was docked.

Q. Did you look at the report of Mr. Blackett, Lloyd's surveyor, which is attached to your answers to interrogatories, before you signed and verified those answers?

A. I had the steamerman read over the report to me as I ran through the various questions, to show that they covered the report; in fact I think he had already checked the answers with this report, and he read it over to me. We had no intention in the answer to minimize the damage whatever, because that was fixed, that was an open record.

Q. Do we understand that you are now in doubt as to whether the ship could have gone to Australia without going into drydock for repairs?

A. Yes.

Q. You are now in doubt, although you stated positively in answer to one of the interrogatories that she need not have delayed that trip on account of her condition?

A. I didn't answer your [198] question properly, your first question. Will you please have that first question given to me again?

Mr. McCUTCHEN.—Read it, Mr. Reporter.

(Testimony of G. H. Carter.)

(The record was here read by the reporter.)

A. (Continuing.) I will correct my answer to "No."

Q. You are not in doubt about it? A. No.

Q. Then is it your present position that she could have gone without undergoing repairs?

A. Without again going over the actual repairs, what they consisted of, with our engineer, I could not answer that question. It is possible that when she was put on the dock the repairs were found which would have made that voyage impossible, but if that is the case it never has been brought to my attention.

Q. Who ordered her into drydock? A. I did.

Q. Pursuant to what?

A. That I cannot remember.

Q. Had not Mr. Blackett, Lloyd's surveyor, told you she would have to go into drydock for repairs, or he would not give you a certificate which would permit her to proceed on her outward voyage?

A. Possibly, but I don't remember it. It is my opinion, however, my recollection, that we ordered her repairs here after the point of her making repairs in Australia was lost.

Q. Mr. Blackett's report of survey, which is attached to and made part of your answers to interrogatories, says:

> "It appears that after the vessel left Hongkong on her return to San Francisco a leak developed in the forepeak, and recommendations were made by the undersigned for the vessel to

(Testimony of G. H. Carter.)

Q. Do you remember that he made that recommendation?

A. No, but it sounds very reasonable, because she was docked. A recommendation might have been made, however, and not followed, without [199] voiding a certificate of seaworthiness.

Q. Suppose the vessel were lost afterwards, and you had not followed the recommendation, what would have been the effect on the insurance?

A. I should say that the seaworthy certificate would be sufficient to cover.

Q. But you had no seaworthy certificate?

A. She would have to have one, otherwise she would not be permitted to sail.

Q. From whom would she have to get it?

A. If it were Lloyd's, I think she would have to get it from Lloyd's agent.

Q. In other words, the issuance of that certificate was prerequisite to her leaving port?

A. It was essential to her clearance.

Q. In the ordinary course of business, what would become of the survey reports issued to the vessel, or to the captain, in Hongkong?

A. They would be in the steamer files, in our steamer files.

Q. How would they get there?

A. They would be mailed here, or possibly brought by the captain.

Q. Are they in your steamer files?

A. I do not know.

Q. Well, if they were brought by the captain.

A. They would be.

(Testimony of G. H. Carter.)

Q. Would he probably deliver them immediately upon arrival? A. He would deliver them.

Q. Immediately upon arrival?

A. He would deliver them at some time on arrival.

Q. Do you mean to say, Mr. Carter, that a captain of a ship to whom a survey of that kind was delivered, would not in turn deliver it to his owners immediately upon arrival?

A. Yes, probably with his other papers.

Q. Immediately on arrival? A. On arrival.

Q. Did not the captain of this ship deliver that survey report [200] to your office immediately upon arrival here on the 27th of June?

A. That I do not know.

The COURT.—We will take this matter up again at two o'clock.

(A recess was here taken until two o'clock P. M.) [201]

AFTERNOON SESSION.

Mr. GRIFFITHS.—If your Honor please, Mr. Blackett, from Lloyd's, is here; he has to leave for Honolulu to-morrow morning; with the consent of counsel we would like to put him on the stand now, out of order.

The COURT.—Very well.

**Testimony of Joseph Blackett, for Respondent.**

JOSEPH BLACKETT, called for the respondent, out of order, sworn.

Mr. GRIFFITHS.—Q. Mr. Blackett, you are

(Testimony of Joseph Blackett.)

the surveyor for Lloyd's Register of Shipping here in San Francisco? A. Yes.

Q. And have been for some time?

A. For seven years.

Q. Do you know the steamship "Cacicue"?

A. I do.

Q. Is she classed in Lloyd's?

A. Yes, she is classed in Lloyd's Register.

Q. Was she so classed in the summer of 1916?

A. She was.

Q. Was she called to your attention after her arrival here from the Orient on June 27, 1916? I do not mean was she called to your attention on the 27th, but was she called to your attention after her arrival here on that date?

A. Yes, between that and the date of the survey, which was held, I think, on the 10th of July.

Q. Where was the survey held?

A. At Hunter's Point Drydock.

Q. How did she happen to go, if you know, to Hunter's Point Drydock, why was she sent there?

A. I recommended her there for examination on account of a leak in the forepeak, stated to be due to heavy weather on the voyage from the far east to San Francisco.

Q. Were any survey reports, as made at Vladivostok and at Hongkong, [202] called to your attention in that connection? A. Yes.

Q. After she went on to the drydock at Hunter's Point, what conditions did you find? Have you got your survey report?

(Testimony of Joseph Blackett.)

A. I have my notes of that date. I find that one plate on each side of the stem in the sixth strake below the main sheer strake cracked, in each case about 20 inches.

Q. What part of the vessel is that?

A. That is immediately next to the stem bar, the forward end. And also the riveting to all frame brackets to the tank top in No. 2 hold started. A large number of rivets in the deep tank center line bulkhead.

Q. What about those rivets?

A. These were started, started to slack.

Q. Those are your notes for the 10th?

A. Yes.

Q. After the repairs were made, did you make a report? A. Yes.

Q. And is this a copy of the report I show you, dated August 2d, which is attached to the answers to the interrogatories?

A. Yes, that is a copy of the report.

Q. Refreshing your recollection by reference to that, can you tell us exactly what the conditions were which you found it necessary to repair?

A. It was necessary to repair the plates, the cracked plates, on this sixth strake below the sheer strake, and to renew the riveting of the gusset plates in the No. 2 double bottom, which is recommended here, and the riveting of the center line bulkhead to be cut out and renewed.

Q. Those were the conditions which you already stated you found in your notes of the 10th.

(Testimony of Joseph Blackett.)

A. Yes.

Q. Did you ultimately find further conditions needing attention, as indicated by that survey report?

A. There is the note of the guard ring of the stern bushing that was broken. [203]

Q. Will you kindly explain to the Court what the guard ring is of the stern bushing?

A. The stern bearing of the propeller shaft, it is a wood bearing, in length about four times the diameter of the shaft. This wood is fitted into a brass bushing, and to prevent the wood from backing out under running conditions, a guard plate is put over the ends—to prevent the strips of wood from backing out.

Q. What is the character of that wood?

A. That is *lignum vitae;* it is a hard wood that stands up to hard wear, and has lubricating qualities.

Q. And inside this wood the propeller shaft revolves? A. Yes, it revolves in the bearing.

Q. And that is what you call the bushing?

A. Yes, the stern bushing.

Q. What were the conditions as to the bushing, as indicated by the report?

A. The bushing showed it was bady hammered, and that pieces were broken out of the ends of some of the strips of wood.

Q. Referring to your statement there regarding the loosening of the riveting and caulking on the

(Testimony of Joseph Blackett.)

gusset plates of the No. 2 deep tank, how did that first come to your attention?

A. By the previous report made by the surveyor in the far east.

Q. At Hongkong? A. At Hongkong.

Q. And what was the character of that report, if you can state?

A. It stated that the tank was leaking through this riveting.

Q. And under what condition was she allowed to come here?

A. She was allowed to proceed then, provided they did not put any water or oil into this double bottom tank.

Q. Referring now, to the cracks in the sixth strake below the [204] sheer strake, the cracks in the plating, I will ask you whether you would pass that vessel as seaworthy to go on a voyage to Australia without the repairs being made? A. No.

Referring to the loosening of the riveting and caulking in the gusset plates on the No. 2 deep tank, I will ask you whether you would pass her as seaworthy to go to sea, to Australia, without being repaired? A. No.

Q. And what can you say as to the conditions in respect to the bushing, as regards to seaworthiness?

A. That would have to be repaired before going out; she would not be seaworthy unless that was repaired.

Mr. GRIFFITHS.—That is all.

(Testimony of Joseph Blackett.)

Cross-examination.

Mr. HENGSTLER.—Q. Mr. Blackett, did you consider the defects in that vessel serious defects?

A. Yes.

Q. When did you find out these defects, after the vessel was in drydock, or before?

A. After the vessel was in drydock.

Q. You stated, did you not, that you did not think the vessel, in her condition, could have safely gone on the voyage to the Australian ports and made her repairs there?

A. She certainly could not, in my opinion.

Redirect Examination.

Mr. GRIFFITHS.—Q. You stated you found those defects after she went to drydock; does that apply to the leak in the forepeak?

A. The actual damage to the plating was found after the drydocking, but the leak in the forepeak, that was stated to me after the vessel arrived, between the 27th of June and the 10th of July, and that was the reason for recommending the vessel on to the drydock, on account of this leak in the forepeak. [205]

**Testimony of G. H. Carter, for Libelant (Cross-examination Resumed).**

G. H. CARTER, cross-examination (resumed).

Mr. McCUTCHEN.—Q. Have you made any inquiry, since you were on the stand this morning, to ascertain whether there is, among your files, a copy of this survey made in Hongkong, and to which Captain Blackett has just referred?

(Testimony of G. H. Carter.)

A. I think I saw a copy of it right here with Mr. Hengstler; I think we have one right here.

Q. Can you tell us when that became part of the archives of your office?

A. No, but I have no doubt that it was handed in with other papers by the captain on his arrival. It is an important document, and I think he would have turned it in with his other papers.

Q. You would think it safe to say, then, would you, that you had that in your possession before noon on the 27th of June?

A. Yes, I think it was in the office before noon.

Q. Is it not possible, Mr. Carter, for you to give us accurate information as to the time when the unloading of that vessel was concluded?

Mr. HENGSTLER.—I think our answers to your interrogatories show that.

A. When she completed unloading, yes, I think we should surely have the time.

Mr. McCUTCHEN.—Q. Can you tell us what she unloaded from day to day?

A. I believe no exact record at all was kept of her daily discharge.

Q. Does not that seem to you to be quite remarkable, Mr. Carter, that none of your departments kept any record of the tonnage discharged from that ship from day to day?

A. No; it would only be a rough estimate. They were working as fast as possible, with very poor men, on a very congested dock, during this strike. [206] I think it would have been more than un-

(Testimony of G. H. Carter.)

likely to have any records which would amount to anything.

Q. That condition continued, did it not, from the time you began until you got through, that is, you were working as fast as possible with the poor tools with which you had to work?

A. Yes, up to a certain extent we were. We did not work, as I remember it, 24 hours a day; we did not work right through the night; we abandoned that; we had expected to do that at first; at the same time, we did considerable night work.

Q. Was not that because you considered it unsafe to endeavor to work at night with the crews that you had?

A. No, but because it did not seem worth while.

Q. Had there been a good deal of violence on that wharf prior to the time that the "Cacicue" arrived?

A. No, I think not.

Q. You say it is your impression that there had not been a good deal of violence down there?

A. I have no recollection of any unusual violence. Of course, during a strike there is always more or less violence on the waterfront; but any unusual trouble on that dock, I don't remember any, either before or after it.

Q. You say there was a great congestion of freight: What was that due to?

A. The congestion of freight on the dock would be the congestion caused by the hurried unloading of this vessel.

Q. You know that the unloading of the vessel,

(Testimony of G. H. Carter.)

then, did result in a great congestion of freight on that dock?

A. Yes, a congestion. The dock was undeniably congested.

Q. And there was comparatively little room there on which or in which to deposit incoming freight, was there not?

A. Well, there was ample room. We were keeping ample room for that freight.

Q. For what length of time?

A. We were keeping room for this [207] incoming freight as long as we knew we were to get it.

Q. Did you go down there yourself?

A. No, I didn't go there at all.

Q. Then, how do you know you were keeping room for it?

A. I only know it from reports from our dock men and our steamship men.

Q. Your testimony, then, is based entirely on what somebody else told you, and is not founded on your own knowledge? A. Absolutely.

Q. Is that the case with any of the rest of your testimony?

A. Only with regard to the condition of the dock and what actually transpired on the dock.

Q. What was the quantity of that incoming cargo, in tons?

A. Between 7,000 and 8,000 tons, if my memory is correct. She had a full cargo.

(Testimony of G. H. Carter.)

Q. Would it be correct to say that she had 7,900 tons on board?

A. I should think so; that would be just about her full cargo.

Q. Did I understand you to say this morning that the leak in the forepeak tank did not do any injury or would not do any injury to the cargo?

A. Not necessarily. The forepeak bulkhead should stop any damage from a leak in the forepeak tank. Frequently a vessel will have a leak in the forepeak tank without repairing, except at some stated time, when they are making important repairs.

Q. You said this morning it would not do any damage at all.

A. It would not do any damage, provided the forepeak bulkhead is tight. Of course, any water will do damage if it can get through a ship.

Q. Was the forepeak bulkhead of this ship tight?

A. As far as I know, it was; in fact, I think—

[208]

Q. You say that these surveys or survey reports from Hongkong reached your office before 12 o'clock on the 27th of June; you must have known, then, at that time, that in the condition in which the double bottom tank was, she could not be used to store oil for fuel on the outward voyage?

A. In that tank?

Q. Yes, in that tank.

A. Yes, in that tank she could not, but she did not need that tank for oil on the outward voyage.

(Testimony of G. H. Carter.)

Q. What was her oil capacity other than that tank?

A. I don't remember exactly, but I should say that she had at least 50 per cent more capacity than necessary to take her to Australia, leaving that tank out.

Q. Can you tell us what that was? Instead of giving it in percentages, what was her capacity?

A. I think her total capacity must have been something over 2,000 tons, about 14,000 barrels. If my memory is correct, I should say that her total capacity would be about 2,000 tons of fuel oil, about 14,000 barrels. She burned, at the most, 200 barrels a day; 6,000 barrels should take her, approximately 6,000 to 7,000 barrels would take her to Australia. So her oil capacity was far greater than the voyage necessitated.

Q. Could she get the oil in Australia at that time?

A. I think so.

Q. Do you know that?

A. I don't know it now, but she had plenty of oil to move where she could get oil; in other words, we had anticipated sending her to Australia without repairing that tank, therefore we had figured that the oil was sufficient. On a lot of these details I am a little rusty, because years have passed since then.

Q. If Lloyd's surveyor required that tank to be repaired, in order that the ship could maintain her class, or classification, [209] you would have had those repairs made before the ship left here?

(Testimony of G. H. Carter.)

A. Yes, we would have had to.

Mr. McCUTCHEN.—I think that is all.

Redirect Examination.

Mr. HENGSTLER.—Q. Mr. Carter, with reference to the packages of automobiles that had been deposited on your wharf by the Southern Pacific Company, you stated this morning that you had received notice by the Southern Pacific Company of their having been stopped by the Ford Motor Co. of Canada, and that you were notified that they must not be delivered to your company, were you not?

A. Yes.

Mr. McCUTCHEN.—One moment: I think that is a rather peculiar way to get into the record the contents of a written notification. I think Doctor Hengstler's question, without any offense to him, is incorrectly stated.

Mr. HENGSTLER.—I will be very glad to put the written communication itself, that followed, in afterwards, but Mr. Carter testified this morning that he was notified that his delivery was stopped by the Ford Motor Co.

Mr. McCUTCHEN.—How do you say he was notified?

Mr. HENGSTLER.—Q. How were you notified in the first place? A. We were first advised—

Mr. McCUTCHEN.—Will your Honor permit me a moment? Do I understand this was a conversation with Mr. Carter?

(Testimony of G. H. Carter.)

The COURT.—The witness testified this morning that they had phoned two or three times, and they were finally sent a letter enclosing a copy of a communication from the Ford Company; that letter was not in the file here, and he was to ascertain and report this afternoon, if he could, the exact date and hour of the receipt in his office—it was dated the 22d, I think. [210]

A. It is dated the 26th.

Mr. HENGSTLER.—The 22d.

A. No, the letter from the Southern Pacific is dated the 27th, I think.

Mr. HENGSTLER.—It is dated the 27th. It contained the notice.

Mr. McCUTCHEN.—I want to know whether this witness got that letter. That isn't even an original of the letter, is it, that you have here?

Mr. HENGSTLER.—No, it is not,

Mr. McCUTCHEN.—I think we are entitled to know whether this witness got the letter, and what he knows about it personally.

Mr. HENGSTLER.—I am asking him when he first received notice from the Southern Pacific Company, and in what form he received the notice, that these automobiles would not be delivered by the Southern Pacific Company to the ship.

Mr. McCUTCHEN.—I think there is another objection to that, and that is that the libel does not declare on that. The libel declares on an anticipatory breach set forth in two communications, one on the 26th of June, and the other on the 24th of

June, both of them, it is said—no, one on the 14th of June and the other on the 24th of June, those two communications having been received, one on the 24th or 23d, and the other on the 24th or 26th; at any rate, the receipt of both of those preceded the demand of the 26th for the delivery of the freight.

The COURT.—You must remember that you asked him for anything intervening between the receipt of those letters and the filing of the libel bearing upon this question. He turned to his files and he said that the libel was filed on the 27th, and produced a letter from the railroad company dated the 27th, and it was to ascertain, if he could, at what time that letter reached his office. [211]

Mr. McCUTCHEN.—I think the question I asked him was whether the Ford Company made any communication to him between those dates—whether he received it from the Ford Company.

The COURT.—I believe that is true, as to whether he had, in fact, come in contact with the Ford people, was the form of the question.

Mr. McCUTCHEN.—Yes.

The COURT.—But to my mind—I don't know whether I was wrong or not—that it had a bearing on the question as to whether they were trying to keep the contract alive for one purpose and kill it for another, and I wanted to find out all the facts in the matter.

Mr. HENGSTLER.—That is why the question was asked.

The COURT.—I rather thought that was the purpose of your question. I did not like to have it left in the air.

Mr. HENGSTLER.—That was evidently the object of asking Mr. Carter the question about the 1,100 packages this morning.

Mr. McCUTCHEN.—As a further suggestion, I might say the witness said some time ago that he was testifying to information here that he got from somebody else, and I would like to have him cautioned before answering this question to confine himself to communications that he, himself, had with the Southern Pacific Company.

The COURT.—I suppose that qualification is fundamental.

Mr. McCUTCHEN.—Of course, we are not bound by what the Southern Pacific Company said, but I think that the witness should confine himself to what the Southern Pacific said to him, if conversations between him and the Southern Pacific are to be admitted against us.

The COURT.—I don't know why we are stirring up the trouble [212] at this late date. It is clear to me. If he had received a number of telephone communications that the Ford people did not want any more of this delivered, and that later was confirmed by these letters, why we want to go over that ground again and stir up this trouble among ourselves and outsiders, I cannot quite see. The only thing that was left was to find out the exact

date that letter was received in the office, and this is not throwing any light on that.

Mr. HENGSTLER.—If your Honor is clear on the point—

The COURT.—I am quite clear on it.

Mr. HENGSTLER.—That the Ford Motor Co. exercised this—

The COURT.—The question arose. I am not saying as a legal proposition what they exercised, but I am saying that the testimony was quite clear up to the present. This freight was lying on the dock ready for loading, and the witness says that the freight had been delivered through the mistake of the Southern Pacific.

Mr. HENGSTLER.—The witness, I think, inadvertently, in answer to one of the questions, stated that this cargo was received as freight for the "Cacicue," and that might be misunderstood, and undoubtedly will be used by the other side, and for that reason I wanted to clear up that matter, in what way the cargo had been received; in other words, I want to show—

The COURT.—It had been received to the extent that you filed a libel to foreclose a lien on it.

Mr. McCUTCHEN.—I do not think it is exactly proper that counsel should suggest the witness inadvertently stated that. The witness was very positive and unequivocal, and it is in line with the sworn statement in the libel. [213]

The COURT.—The libel counts on that matter and undertakes to foreclose a lien on it for the

(Testimony of G. H. Carter.)

freight, which probably it could not do if it had not been delivered, I don't suppose. I still revert to my original proposition that the only thing that was left on this question was that he get that letter. The fact itself, is in evidence now, and they put it in such a shape that it can be stricken out.

Mr. HENGSTLER.—Will your Honor permit me to ask this question: When were you first notified of the fact that the goods were stopped and must not be delivered to you?

Mr. McCUTCHEN.—I object to that unless—

Mr. HENGSTLER.—Q. (Continuing.) By letter, or verbally, or in any form.

Mr. McCUTCHEN.—That assumes a fact not proven, as suggested to him, and beyond that I think the witness should be asked the name of the person with whom he had such conversation.

The COURT.—Yes, if he had any conversation.

Mr. HENGSTLER.—Q. Mr. Carter, did you have any conversation— A. (Intg.) None.

Q. (Continuing.) —with anybody acting on behalf of the Southern Pacific Company, Mr. Hardy or anybody else acting for the Southern Pacific Company, in which you were notified that the automobiles which were on your wharf had been delivered inadvertently by the Southern Pacific Company, and that you must not consider them as freight for the "Cacicue," and that the Southern Pacific Company could not deliver them to you?

Mr. McCUTCHEN.—I suggest that is leading and suggestive.

The COURT.—Yes.

Mr. McCUTCHEN.—And beyond that, we are not bound by a conversation between this witness and the Southern Pacific [214] Company.

The COURT.—That throws a new element into it. It appears now for the first time that you must not consider it as the freight for the "Cacicue." That is the first time I heard of that.

Mr. HENGSTLER.—I think that is exactly the point. This is in the letter written—

Mr. McCUTCHEN.—What letter?

Mr. HENGSTLER.—In evidence now, dated June 24, 1916, by L. C. Davis, to W. R. Grace & Co., and in that letter W. R. Grace & Co., are notified by Davis that unless the 4,075 tons is taken on the understanding which is set forth in that letter and not subject to freight for 6,000—unless it is taken not subject to freight, they request that we withhold the loading of any of this cargo. In other words, on the 24th, Davis notified Mr. Carter, as it is in evidence, to withhold the loading of any of this cargo, which was on the wharf, which had been delivered by the Southern Pacific Company on the wharf; that is the condition in which that cargo was. In addition to that, I desire to show that Mr. Carter was informed by the officials of the Southern Pacific Company about that time—I want to get the date from him—that the Southern Pacific Company had been instructed by the Ford Motor Co. of Canada not to deliver any cargo to the "Cacicue."

The COURT.—You are coming back to the ori-

(Testimony of G. H. Carter.)

ginal proposition, now. Your question went a furlong further, to the extent that the cargo already on the dock could not be regarded as freight. That may be true, I don't know, but the form of the question is so distinctly leading that it ought to be reframed. Might I ask the witness a question? [215]

Q. Did you have any communication directly with the Southern Pacific Company concerning this?

A. None.

Mr. McCUTCHEN.—I move that all of the witness' testimony on that subject be stricken out.

The COURT.—Let it go out.

Mr. HENGSTLER.—I don't know whether Mr. Carter understands the situation or not. You told me during the noon recess that you did have conversations with officials of the Southern Pacific Company, did you not?

A. No, not personally. They were reported to me from our traffic department.

Q. Who reported them to you?

A. Mr. Moore.

Mr. HENGSTLER.—I will recall Mr. Moore, then.

The COURT.—I just felt that we would run this thing along until it would be stricken out.

Mr. HENGSTLER.—I understood that the witness would be notified by officials of the Southern Pacific Company personally. At this point, if your Honor please, I desire to state that I received a communication from the Southern Pacific Company,

signed by Mr. William F. Herrin, on June 27, 1916, and that I have lost the original letter. I mentioned the matter to Mr. Williamson, yesterday, and he had no objection to my introducing in evidence a copy of the letter which was received from the Southern Pacific Company, and which contained a copy of the letter written by the Ford Motor Company, signed by Mr. L. C. Davis, June 26, 1916.

Mr. McCUTCHEN.—May we see that?

Mr. HENGSTLER.—Yes.

Mr. WILLIAMSON.—Is that the copy I gave you?

Mr. HENGSTLER.—Yes.

Mr. McCUTCHEN.—Did this come through the mail? [216]

Mr. HENGSTLER.—This came through the mail.

Mr. McCUTCHEN.—Then it may very well be you did not get it on the 27th.

Mr. HENGSTLER.—No, I received it on the 27th.

Mr. McCUTCHEN.—What time on the 27th?

Mr. HENGSTLER.—I received it in the forenoon on the 27th. It contains this notice of June 26th. My recollection is that I received it before the libel was filed, whether it was noon or just what hour it was I could not state now.

Mr. McCUTCHEN.—Where is the original letter? I am not questioning your statement, but—

Mr. HENGSTLER.—The original letter is lost in my office. I had that original letter up to a short time ago, but it has been mislaid; it has been filed

probably in the wrong file, and Mr. Williamson has a copy of this letter, and the enclosure.

Mr. McCUTCHEN.—I understand that; that is not the point. Mr. Williamson furnished you with that letter. There is no question about that. But I must say I have some doubt—I do not question the truthfulness of your statement, if you have any distinct memory of it; a letter written on the 27th and placed in the mail would not have reached you the forenoon of the 27th.

Mr. HENGSTLER.—Of course, I don't know whether it was written on the 27th,—if it was placed in the mails at that time—events happened very rapidly. I have been in communication with Mr. Herrin and Mr. Durbrow over the phone, and W. R. Grace have been in communication with other offices of the Southern Pacific Company, and these matters were sent with very little delay.

Mr. McCUTCHEN.—I take it that what counsel really wants is this letter from Mr. Davis, enclosed in the letter from Mr. [217] Herrin. I do not think that we are bound by any statement that Mr. Herrin made, and we do not make any objection to the use by him of the Davis letter.

Mr. HENGSTLER.—My main object is to have the Davis letter in evidence.

Mr. McCUTCHEN.—I am not willing to admit, however, that that Davis letter came into their possession before the filing of the libel, and, indeed, it is not one of the communications, one of the two

communications that the libel alleges contains anticipatory breaches of this contract.

Mr. HENGSTLER.—There is no objection, then, to introducing in evidence the Davis letter?

Mr. McCUTCHEN.—What is the purpose of that, I would like to ask?

Mr. HENGSTLER.—The purpose of that letter is to show that as a matter of fact from and after June 22d the Ford Motor Company of Canada had stopped this cargo in transit, and had given notice to the Southern Pacific Company that they must not deliver this cargo of the "Cacicue."

Mr. McCUTCHEN.—At present. The "Cacicue" was not ready to receive cargo.

Mr. HENGSTLER.—Whatever the notice says. This is the notice which was contained in a letter which I received on June 27, and the stoppage went right up to the time of the libel.

Mr. McCUTCHEN.—We make objection, if your Honor pleose, that this letter has not anything to do with the transaction for the reason that in the first place it is not an instruction to the Southern Pacific to stop the delivery except at present. There is no suggestion that it interfered with the ability of the "Cacicue" to load, and it is not one of the [218] two documents or papers which are relied upon in this libel as containing the anticipatory breach.

The COURT.—The objection will be overruled.

Mr. HENGSTLER.—The letter is on the letter-

(Testimony of G. H. Carter.)

head of the Ford Motor Co., Automobile Manufacturers, San Francisco, June 22, 1916.

"Mr. W. J. Hardy,
"Southern Pacific Co.,
"Fourth & Berry Streets,
"San Francisco, Cal.

"Dear Sir:

"Attention Mr. Frank Renz, Steamer Clerk.

"All statements or agreements contained in this letter are contingent on strikes, accidents, fires, or any other causes beyond our control, and all contracts are subject to approval by the signature of the duly authorized executive officer of this company. Clerical errors subject to correction."

The body of the letter is:

"Confirming our telephone conversation of recent date:

"Until you are authorized to do so, please do not, under any circumstances, deliver any of the cargo at present on hand booked steamer 'Cacicue' to W. R. Grace & Co.

"FORD MOTOR CO.
"Traffic Department,
"L. C. DAVIS."

Q. Now, Mr. Carter, were you notified of the contents of this letter thereafter?

Mr. McCUTCHEN.—I object to that as calling for hearsay.

The COURT.—What was the question?

Mr. McCUTCHEN.—He asked if he was notified of the contents of this letter thereafter.

(Testimony of G. H. Carter.)

Mr. HENGSTLER.—Q. In the regular course of business, of this "Cacicue" transaction?

The COURT.—I do not quite see the bearing of the question. [219]

Mr. HENGSTLER.—I will call Mr. Moore again to show that W. R. Grace & Co. were aware from that time on that this cargo could not be delivered to them, and was not in their possession.

The COURT.—From what time on?

Mr. HENGSTLER.—From June 22d; that it remained in the possession of the Ford Motor Co.; although it was on the wharf, delivered by mistake upon the wharf of the "Cacicue." I think the point is important in view of the position that the other side has taken in this matter.

Now, if your Honor please, I called for the production of communications between the San Francisco office of the Ford Motor Company and the Ontario office of the Ford Motor Company with reference to this shipment of automobiles on the "Cacicue" prior to the time when the contract was entered into, and if I understand Mr. Williamson correctly, he has stated to the Court—I am not certain whether my understanding is correct—that he has no such communications.

Mr. WILLIAMSON.—I have none. I laid before you yesterday afternoon all correspondence of every kind between February 24, which was the first that I had, and the time of the filing of the libel.

Mr. HENGSTLER.—You stated that the balance of these letters had been destroyed.

Mr. WILLIAMSON.—I stated that my inquiry at San Francisco at the American Ford Company's office disclosed the fact that they, having no interest in this suit, destroyed their files two years ago, and that whatever there might still be in Ford, Ontario, of course, I would get.

Mr. HENGSTLER.—I have had an opportunity to examine one of two files that I asked my opponent to produce, and went over one [220] yesterday with Mr. Williamson. The other file I have not so far had an opportunity, on account of lack of time, to examine. I would like to have an opportunity to examine the other file. Have you the file here, Mr. Williamson, that we examined yesterday?

Mr. WILLIAMSON.—Yes.

Mr. HENGSTLER.—I desire to put a number of letters and telegrams that passed between the Ford Motor Co. of Canada and the Ford Motor Co. of San Francisco in evidence, because they have a bearing upon the main issues in this case. The first letter that I ask for is the letter of February 25, from Ontario to San Francisco.

Mr. WILLIAMSON.—A telegram.

Mr. HENGSTLER.—I introduce in evidence a telegram—

Mr. WILLIAMSON.—Doctor, are you going to read these as you introduce them?

Mr. HENGSTLER.—I think it would be better, for the Court to get a correct idea of the main points of this transaction, if I read these letters now.

The first telegram is a telegram from the Ford Motor Co. of San Francisco to the Ford Motor Co. of Canada, Ford, Ontario, Canada, dated San Francisco, Cal., February 24, 1916, reading as follows—will you permit me only to read that part here?

Mr. WILLIAMSON.—I was going to suggest there is only one small portion, and that you read that.

Mr. HENGSTLER.—I will read only the portion which refers to this shipment:

"If you can take 6200 tons for early June can close with Grace Co. same rate Wellington and Sydney or Wellington and Melbourne. Must know Friday." [221]

The telegram from the Ford Motor Co. of Canada reads as follows:

"Ford, Ontario, February 25, 1916.

"Ford Motor Co., San Francisco.

"Accept Grace offer 6200 tons, confirm advising names and dates of sailing.

"FORD MOTOR CO. OF CANADA, LTD."

I next offer in evidence a night letter, reading as follows:

"San Francisco, Cal., Feb. 27, 1916.

"Ford Motor Co. of Canada, Ltd.

"Ford, Ontario, Canada.

"Have signed with Grace American Steamer 'Cacicue' about June 24th. Union advise Illinois Central made them firm offer your account six thousand tons at fifty-two fifty."

Is it admitted, Mr. Williamson, that "Union" means Union Steamship Company?

Mr. WILLIAMSON.—That is admitted.

Mr. HENGSTLER.—This continues: "They prefer doing business direct in order play fair with terminal line agents. If you haven't closed wire us authority, think can close at forty-seven fifty. Union will take all small shipments on Kurow from here March twenty-third, rate thirty dollars. How much of Illinois Central four thousand ton booking can you give Union for steamer March 29th sailing. Answer this wire immediately. Confidential. Ford Motor Co."

Mr. WILLIAMSON.—I am going to make a suggestion to you, Doctor, that I think will save time. Where the communication is from the Ford Motor Co. of Canada, Limited, you can simply say, "From Respondent"; and when it is from the Ford Motor Co. of San Francisco, where that is mentioned, you can simply say "Ford Co., San Francisco." It will save reading all those [222] long names.

Mr. HENGSTLER.—I shall be very glad to do so.

The next is a letter from respondent to Ford Motor Co., San Francisco, dated February 28, 1916:

"We received your night letter of the 27th.

"You state you have signed with the Grace American steamship 'Cacicue' sailing about June 24th.

"You do not state the number of tons or the port. Please let us have this information by wire imme-

diately upon receipt of this letter, if it has not already been forwarded at that time. Please also state the rate.

"Yours very truly,

"PRITCHARD."

The next is a night lettergram from respondent to Ford Motor Co., San Francisco:

"Your wire re steamer 'Cacicue' and eight thousand tons. We need about four thousand tons in addition to ten thousand arranged to end July say for late June early July sailing. Arrange for this lowest rate and not exceeding $52.50. Complete specification by ports to end July to you, and complete letter instructions."

The next is dated March 1, Ford Motor Co. of San Francisco to Respondent:

"Confirming our wire of the 27th, we are enclosing herewith contract executed by W. R. Grace & Co. of this city for sixty-two hundred tons for Wellington and Sydney per their American Steamer 'Cacicue' for June loading at the rate of $47.50 per ton.

"You will note in our wire we advised you that Grace & Co. would take this tonnage to either Wellington and Sydney or Wellington and Melbourne, but not make the call at the three named ports, and you will note the contract reads Wellington and [223] Sydney. If possible, we think it would be advisable for you to endeavor to ship Sydney and Melbourne rather than Wellington, as we figure that we will be able to supply Wellington through the

Union Steamship Company by direct sailings.

"We would call your particular attention to the last paragraph of the contract in which the steamship company state shippers will be charged demurrage at the rate of $3,000 per day. However, we figure that with the sufficient time which will elapse between now and the sailing date, you will be able to have this shipment on hand. The boat is scheduled to sail about the 14th of June. If you desire to load out some of this shipment, the Grace Co. have advised us they will be able to store on their dock about fifteen or twenty carloads. Therefore, you should be well posted on the car situation, and be sure to have your equipment so that there will not be the slightest delay."

I have here, Mr. Williamson, a note of a telegram of March 1st.

Mr. WILLIAMSON.—You will remember that we found a couple in the other file, Doctor, a couple that were not here. What was the other telegram? I kept them just as they came to me.

Mr. HENGSTLER.—A wire from the Ford Co. of San Francisco.

Mr. WILLIAMSON.—I showed you that last night. Is this it?

Mr. HENGSTLER.—March 1, yes.

"Your wire steamer 'Cacicue' and eight thousand tons"—I think I read that.

Mr. WILLIAMSON.—Yes, you read that in the letter.

Mr. HENGSTLER.—Yes, that is right, I read that in the letter.

The COURT.—Let me see that; I don't know that I caught it just right. [224]

Mr. WILLIAMSON.—Yes, your Honor.

Mr. HENGSTLER.—What letter was that in, Mr. Williamson?

Mr. WILLIAMSON.—I think I heard you read it just a moment ago.

Mr. HENGSTLER.—I am confused about that, Mr. Williamson. I don't think I read it. In order that there shall be no question about it, I think that I had better read it again.

"Your wire re steamer 'Cacique' and eight thousand tons. We need about four thousand tons in addition to ten thousand arranged to end July say for late June early July sailing. Arrange for this lowest rate and not exceeding $52.50. Complete specification by ports to end July to you and complete letter instructions."

The next is a night lettergram from respondent to Ford Motor Co., San Francisco. It is dated March 2, 1916:

"Understand you have arranged sixty-two hundred tons, our understanding this is the only contract you have arranged, and this is all we will need to end of July; we have already signed contracts Illinois Central Railroad for four thousand and six thousand tons."

The next is March 3, 1916, respondent to Ford Motor Co., San Francisco.

"Please advise definitely what you are able to do. We have contracted for four thousand tons and six thousand tons Illinois Central. Understand you have engagement by steamer named 'Casique.' We are also informed you have engaged six thousand two hundred tons. We need only about six thousand tons in addition to what we arranged and would like this for June-July sailing; advise."

The next is March 3, Ford Motor Co., San Francisco, to respondent:

"Grace Steamer 'Casique' booking is sixty-two hundred tons, [225] rate forty-seven fifty, Port Wellington or Sydney or Wellington and Sydney. Cannot go to Melbourne. Contract mailed March first. Please reply our wire second regarding Union boat for first week in April for Sydney."

The next is March 4, Ford Motor Co., San Francisco, to respondent:

"Regarding exchange of wires on space secured by the Illinois Central and this office, this is how the situation lines up at the present time.

"We secured from the Union 3500 tons per steamers 'Kurow' and 'Waikawa,' rate $35.00. This freight is now moving. The Illinois Central from the Union 4,000 tons at $47.50 and another 6,000 at $52.50. We next secured from Grace & Company per their steamer 'Cacique' sailing from here about June 15th for Wellington and Sydney 6,200 at $47.50, or a total of 19,700 tons.

"Your wire of the 2d as follows:

" 'Advise immediately what you can do about six thousand tons.'

led us to believe you wanted still more space immediately, which we endeavored to secure from the Union. They have cabled their Australian office for another boat and should have a reply early next week.

"As advised you in one of our wires 'We are negotiating with the Union for eight thousand tons' which we felt sure you needed but from subsequent wires it would seem that you have all the space required up to June and July and will need no more until late July or early August.

"Please keep us well posted on contemplated shipments in plenty of time for us to secure space.

"We might advise that the Union Steamship Company are favorable to us, they having been in receipt of advice from their Home [226] Office in Australia which stated in part 'to take care of Ford' so this would indicate that although they have been offered higher rate than $52.50, we will be able to secure considerable space at that rate. We are recently informed that their latest quotation was $60.00. However, as above stated we seem to be the favored ones because we have always set the pace as to rates."

The balance of it is immaterial.

The next is March 28, 1916, respondent to Ford Motor Co., San Francisco:

"Have not heard from you with ports and quantities for 'Cacique.' You state sixty-two hundred tons. We will be able to give forty-two hundred eighty-four tons made up Adelaide seventy-two, Brisbane one hundred twenty, Fremantle seventy-two, Melbourne two hundred and four, Sydney two hundred and twenty-eight, Wellington three hundred twenty-four, plus any left overs from Union Steamship contracts. Do not reserve any more space until July."

There is a letter of March 30, Mr. Williams, from respondent to Ford Co. of San Francisco; that must be in your other file.

Mr. WILLIAMSON.—I guess that was the one we found in this file last night.

Mr. HENGSTLER.—Yes, you said it was in the other file.

Letter from respondent to Ford Motor Co., San Francisco, dated March 30, 1916, reading as follows:

"We refer to your wire of March 29, advising us to look at the 'Casique' contract to see ports, and arbitraries, etc. We have not yet received this contract. The arrangement in our recent letter, however, holds."

Letter of April 3, 1916, from Ford Motor Co. of San [227] Francisco to respondent, reading as follows:

"We have your letter of the 30th, in which you advise you had not received contract which we executed with Grace & Co. for 6200 tons per their steamer 'Casique' for June sailing, and to say that

we were surprised at your letter is expressing it mildly. We wrote you on March 1st as follows:

"'Confirming our wire of the 27th, we are enclosing herewith contract executed by W. R. Grace & Co. of this city for 6200 tons for Wellington and Sydney per their American steamer "Casique" for June loading at the rate of $47.50 per ton' "—

Mr. WILLIAMSON.—Doctor, you are reading again the letter you have already read in. It is the letter of March 1st. The first three paragraphs are a duplication.

Mr. HENGSTLER.—Then Mr. Davis quotes in this letter, in the second paragraph, beginning with the words, "You will note," and ending with the words "direct sailings," and in the next paragraph, beginning with the words, "We would call your particuar attention," and ending with the words, "slightest delay." Then the letter proceeds:

"You will note from this letter that the contract has been entirely arranged for, and as we wired you to-day we are compromised for 6200 tons and will be obliged to pay dead freight for any unshipped portion.

"At the time of enclosing the original contract with this letter, the importance of the transaction was very firmly impressed upon the writer and he is positively sure that this original contract was enclosed with the above letter. If this letter has not reached you there is something wrong with the mails and we have started an immediate investigation with a view of locating this letter. [228]

"We are enclosing herewith copy of the original contract dated February 25th which, with your authorization, was signed by the writer.

"We trust that nothing will stand in the way of your fulfilling same and supplying the steamer 'Cacique' with the tonnage as originally contracted for."

Letter from Ford Motor Co. of San Francisco, to respondent, dated April 3, 1916:

"In re: S. S. 'Cacique'

"We acknowledge receipt of yours of the 28th and with considerable surprise note that you will only have 4284 tons for the contract which we signed to cover 6200 tons. At the time of writing this letter, we have not taken this matter up with the W. R. Grace Company, but we feel that when it is taken up with them they will desire to cancel our contract entirely.

"We have written and wired you requesting from your office absolute assurance that the embargo, which is threatened by England, will have no effect on our shipments but as yet we have not received this assurance from you, excepting a wire in which you state that the embargo on England would not affect Australia and New Zealand unless those countries saw fit to make it apply, but this was not sufficient assurance for the W. R. Grace Company. As also advised, we are negotiating with them for about 2000 tons on their S. S. 'Cuzco' to take the cargo which was burned in St. Johns Harbor.

"We are anxious for something definite on this

and we should like very much to hear from you. We have been made offers by reliable concerns here for sailing vessels at a rate from $30.00 to $35.00 or perhaps $40.00 or steamer rate of $55.00 which we think is the best that can be done at this time.

"We wish you would go over these matters thoroughly and [229] advise just what can be done with regard to the 'Cacique' and also reply to our wire of the 29th regarding the 'Cuzco' which Grace & Company will probably send to Wellington and Sydney if you can give positive assurance that the embargo will not in any way affect the movement."

And then there is the following postcript:

"P. S.—In the above we have mentioned nothing regarding contract mailed to you in ours of March 1st. This contract was executed by W. R. Grace & Co., and covers 6200 tons space in their American Steamer 'Casique' for June loading, at $47.50 per ton to ports of call. We have never received an acknowledgment of this letter stating that you had received this contract."

Letter from respondent to Ford Motor Co. of San Francisco, dated April 4, 1916:

"S. S. 'Cacique'.

"We refer to your wire of April 3d reading—

> "Refer our letter March first enclosing contract with W. R. Grace their Steamer 'Cacique' we are definitely compromised for sixty-two hundred tons for this vessel otherwise dead freight will be payable on any unshipped quantity.'

"We are sorry that we did not know the existence of this contract. It has never been received at this office. Had we had it, we would not have made certain space engagements for May, for which we received a very advantageous rate by the New Zealand Shipping Company out of Montreal, a rate of $35.00 per ton. We did not know that your booking with the Grace Company was firm for this whole amount, and took up the balance of the 6200 tons over and above 4284 tons of which we advised you we had present specifications for, by this New Zealand steamer.

"However, we expect certain additions from Australia, which [230] will no doubt bring our specifications up to the required amount.

"You might send us copy of the contract and copy of your letter enclosing same."

Letter from Ford Motor Company, San Francisco, to respondent, dated April 10, 1916:

"We have your letter of the 4th which is in reply to our wire of April 3d.

"We regret exceedingly this unfortunate circumstance and we are at a loss to understand where the contract with W. R. Grace covering 6200 tons for their steamer 'Cacique' could have gone to. Naturally, had same been wrongly addressed, it would have been returned to us and as the writer is quite careful in enclosing these contracts personally, we, of course, felt absolutely certain that same was forwarded to you in our letter of March 1st, copy of

which and also copy of contract have been mailed to you under recent date.

"Our correspondence prior to the mailing of the contract referred to 6200 tons and we had never at any time specified any smaller amount for this boat and we, of course, thought the matter was thoroughly understood by you."

I desire to call your Honor's attention to the fact that this letter refers to "our correspondence prior to the mailing of the contract referred to." That was the correspondence for which I called, and which seems to have been destroyed. Then the letter goes on:

"We hope that you will be able to supply the tonnage as W. R. Grace & Company have contract for more tonnage for this boat and as you know, it must go down there and return empty, and as they have arranged their schedule, you realize the importance of our fulfilling our contract. [231]

"If you think you will not be able to supply this cargo, kindly let us know immediately or as soon as practicable in order that we may take the necessary steps to secure tonnage at this end."

Mr. WILLIAMSON.—Doctor, I don't like to have that statement made by you go unchallenged in the record. I don't know that there ever was any prior correspondence. The telegram from Mr. Davis was: If you can use so much, 6200 tons, on this steamer, we can get it on Grace steamer "Cacicue." That telegram was produced. The next telegram from the Ford Company, the respondent,

was: We will accept, wire us dates of sailing. That telegram was produced. So far as I know, that is all there ever was prior to the making of the contract. I don't like to have the record show that apparently anything is missing. We do not know that there is.

Mr. HENGSTLER.—I don't know whether there is, or not. I simply called attention to the reference in the correspondence.

Mr. WILLIAMSON.—I think it is better understood in the record now that neither of us knows that there is anything else.

Mr. HENGSTLER.—The next is dated April 10, 1916, Ford Motor Co. of San Francisco, to respondent:

"We thank you for your letter of the 4th regarding the so-called embargo which we were in fear of being placed on automobile to Australia.

"Of course, at this time it is too late for W. R. Grace & Company to withdraw as they have signed up sufficient cargo in addition to our 6200 tons that at the present time it is impossible for them to withdraw their ship. However, your assurance relieves them of considerable anxiety and we are sure that everything will come out all right." [232]

Letter from respondent to Ford Motor Co., San Francisco, dated April 19, 1916, reading as follows:

"S. S. Cacique.

"We understand that we are supposed to have 6200 tons on this steamer. Actually we have cars for only 4572 tons. Due to the nonreceipt of the

contract and the uncertainty we were in concerning this steamer, as expressed in our telegrams and letters to you, we engaged space for certain cars by the S. S. 'Whakatane' and 'Paheka' of the New Zealand Shipping Company, which otherwise would have gone on the S. S. 'Cacique.'

"There will be about 1628 tons space which we will be unable to use. This is for your information and the information of the Grace Company, in order that they may fill up this space.

"This of course, is on the assumption that the Union Steamship Company are going to take the full number of cars which have been shipped for their 10,000 contract. These cars are now en route.

"If there is any disposition on the part of the Union Steamship Company to fall down on any boats, or you can gauge the amount by which they will fall down among the steamers for which they have space, you will please make immediate arrangements to transfer these to the steamer 'Cacique,' in fulfillment of this 1628 ton shortage.

"In the event of the Union Steamship Company having any left overs from the steamers which they specify, if you will advise us just the tonnage that will likely be left over, we can arrange to tell you what invoices to put aboard the 'Cacique.'

"Will you please give this matter your immediate attention?"

The next is dated May 4, 1916, letter from respondent, signed by Prichard, to the Ford Motor Co., San Francisco: [233]

"We are writing you concurrently showing the number of cars by ports and the date that these will leave the factory for the Grace Steamer Cacique. We find that the total tonnage we will have for this steamer will be 5,087 tons.

"We have advised you concurrently about an offer from Henry W. Peabody & Company, 17 State Street, New York City for 600 tons space by this steamer."

Letter dated May 4, 1916, from respondent to Ford Motor Co., San Francisco:

"We enclose confirmation of our wire which was the result of a wire from Henry W. Peabody & Company, 17 State Street, New York City, stating they would take 600 tons space on the steamer 'Cacipue.'

"We have told them to deal directly with Grace & Company.

"We have intimated to you that we cannot take the whole amount of the cargo on the 'Cacique' and will forward you by concurrent letter a complete layout of the space we will be able to absorb.

"There may be certain parts shipments in addition, concerning which we will advise you later."

Have you, Mr. Williamson, that concurrent letter referred to here, in which there is a complete lay-out of the space?

Mr. WILLIAMSON:—No. The original should be there and the copy should be here. There is a lay-out of space here, but I don't know whether this is it or not. Here is a copy of the letter of May 4th, but the specifications are not in here. I think

they probably will conform to these that appear a few days later; I don't know that, but I imagine that will be the case.

Mr. HENGSTLER.—The next is a letter dated May 5, 1916, [234] from respondent to Ford Motor Co., San Francisco, reading as follows:

"We are shipping to-day in Car CMStP. 78162 carload of parts for Australia and New Zealand.

"These parts are going forward to make connections with steamer 'Cacique.'"

The next is dated May 6, 1916, from respondent to Ford Motor Co., San Francisco, reading as follows:

"We have shipped two carloads of parts for the steamer 'Cacique' in addition to tonnage of which we have previously advised you. These two carloads of parts contain 38.20 tons, this in addition to the tonnage of which you were advised in our recent letter."

The next is dated May 11, letter from respondent to Ford Motor Co., San Francisco, reading as follows:

"We would be glad if you would let us know exactly how we stand with respect to the tonnage on this boat at the present time, after taking into consideration the moving forward of all cars of which you have been advised, as contemplated by this steamer, together with parts tonnage of which you have been advised separately.

"The Sales Department is sending you a complete memorandum as to this tonnage, together with the

date of shipment of all these cars from the factory."

I would like to get that memorandum, if you have it, Mr. Williamson.

Mr. WILLIAMSON.—I have not, Doctor, unless it is this one without a date. That shows the number of boxes, the number of cubic feet, and the ports. It refers to the May 5th shipment which you referred to a few minutes ago, and the May 6th shipment. [235]

Mr. HENGSTLER.—Does it contain the dates of shipment of the cars?

Mr. WILLIAMSON.—Certain shipments for May 5 and certain shipments for May 6th.

Mr. HENGSTLER.—Only those two? It is not a complete memorandum.

Mr. WILLIAMSON.—No. That is all I have in this file. Just a moment, Doctor; on the other side of the paper I notice there are some shipments. You can look at this.

Mr. HENGSTLER.—That could not be a complete memorandum.

The next is May 11, 1916, letter from respondent to Ford Motor Co., San Francisco, reading as follows:

"We are enclosing herewith our May schedule showing the number of cars which will be shipped from the factory each day for the steamer 'Cacique.' This will amount to 1288 cars.

"We advised you some time ago that we would have 1316 cars for the 'Cacique,' but we find it im-

possible to ship this number on account of new method of crating."

This last letter mentions a new difficulty encountered by the respondent in making the delivery of the cars.

The next is May 12, 1916, letter from Ford Motor Company, San Francisco, to respondent, reading as follows:

"Please refer to your letter of April 19th and subsequent letters and telegrams regarding tonnage for Grace & Company's S. S. 'Cacique.' In your letter of the 19th you advised you will be 1628 tons short.

"On May 1st we received your wire in which you advised there were 1316 cars in all and based on the measurement of approximately 4.3 tons each would make a total of 5658 tons. This leaves only a difference of 542 tons for which we have signed contract with Henry W. Peabody & Company. [236]

"Then in your telegram of the 8th you advised that complete tonnage for 'Cacique' was 5087 and 4 carloads of extra parts, which carloads of parts we understand measure approximately 32 tons each or 128 tons, which makes a total of 5215 tons. Therefore, we are still shy a cargo for this ship.

"We, therefore, request that you advise us as soon as possible just what tonnage you will use, also amount of tonnage to be shipped to Wellington and Sydney. This, of course, includes all transshipments, so that Grace & Company will be able to tell just about how much freight will be left at Sydney and how much at Wellington in order to enable

them to properly stow other cargo."

The next is a letter dated May 12, 1916, from Ford Motor Company, San Francisco, to respondent, reading as follows:

"We are enclosing herewith contract, which we have signed with Henry W. Peabody & Company covering 542 tons space on Grace & Company's steamer 'Cacique,' which space you will not be able to fill and for which we are charged by Grace & Company. You will note we have succeeded in securing a rate of $47.50 and if you can supply the rest of the cargo making up the 6200 tons, there will be absolutely no loss on this contract.

"The writer was advised recently by Grace & Company that should we fall short or over about 75 or 100 tons that it would be entirely satisfactory to them.

"Trusting this action meets with your entire approval," etc.

The next is a letter dated May 12, 1916, from Ford Motor Company of San Francisco to respondent:

"We wired you on the 6th to advise us immediately quantities for 'Cacique' for Wellington and Sydney. This information as we have spoken of in another letter is absolutely necessary for Grace & Company to have in order that they may properly [237] figure their storage.

"On May 8th we received reply to this wire, in which you stated the number of cars you were shipping for Wellington and Sydney, and as the pre-

vious wires of May 1st and 5th were somewhat different in regard to tonnage, we are still at a loss to figure just exactly what the remaining tonnage for Wellington will be which you advised you will ship on May 11th.

"Therefore, please let us know as soon as possible as far as you can the total amount of tonnage for this boat, also just how much will be discharged at Sydney and Wellington."

Letter of May 13, 1916, from Ford Motor Company, San Francisco, to respondent, reading as follows:

"We have yours of the 5th advising of the forewarding of CMStP. 78162 carload of parts for Australia and New Zealand, to connect with the 'Cacique.'

"We trust you will keep us thoroughly advised as to the complete amount of tonnage in these part shipments that you anticipate shipping on this boat as we do not wish to contract for any more space with other concerns unless it is absolutely necessary. Also kindly advise us approximate amount of tonnage in each of these part shipments as soon as possible."

Letter of May 20, 1916, from Ford Motor Company of Canada, signed by Pritchard, to Ford Motor Company of San Francisco, reading as follows:

"Cacique—Peabody Space.

"We refer to your letter of May 13th.

"We have written you a concurrent letter indicat-

ing the fact that there has been a misunderstanding in connection with the space on the 'Cacique.' We had not assumed that we were going to be held for 6200 tons space, and when the request was received [238] from Peabody & Company, we immediately referred them to Messrs. Grace & Company. We assumed that their arrangement had been made with Grace & Company, and preferred that it should have been made with them in order to relieve this Company of any liability.

"We will therefore have you refer Messrs. Peabody & Company's contract to Messrs. Grace & Company."

Letter dated May 20, dictated on the 19th, from respondent to Ford Motor Company, San Francisco, attention Mr. L. C. Davis:

"We have your letter of May 13th requesting that we keep you advised as to number of shipments we forward for connection with the steamer 'Cacique.'

"We advised you in a letter several days ago complete contents of the first three carloads that went forward to you for the above steamer, and might also advise you that we forwarded to-day a fourth carload consisting of the following:—

| Port. | No. Boxes. | No. Cu. Ft. |
|---|---|---|
| Sydney | 36 | 570 |
| Adelaide | 10 | 60 |
| Melbourne | 19 | 367 |
| Wellington | 7 | 258 |
| Perth via Freemantle | 3 | 21 |
| Brisbane | 3 | 43 |
| Hobart, Tasmania | 2 | 14 |

"At the present time we have no more parts on order for dealers in Australia and New Zealand. If we receive orders in the course of the next few days that can make connections with the above steamer we will advise you promptly."

Mr. WILLIAMSON.—Now, Doctor, you will see that that is the fourth shipment. The one I offered you a few moments ago and that you thought was not complete, covered three shipments. They say here, 'We advised you in a letter several days ago of three complete carloads.' Now you have the data for the fourth, [239] and, therefore, everything up to date.

Mr. HENGSTLER.—Up to date, May 20, 1916, four carloads were shipped.

Mr. WILLIAMSON.—They were apparently sent forward in that way.

Mr. HENGSTLER.—The next is a letter dated May 25, 1916, dictated May 23, from respondent, signed by Pritchard, to Ford Motor Company, San Francisco, reading as follows:

"Re 'CACIQUE.'—Attention Mr. Davis.

"The question of space on this steamer is giving us a great deal of concern at the present time.

"You will recollect the inception of this transaction was not understood by this company. For a considerable length of time we did not know what if any arrangements you had made with the owners of the 'Cacique.' During this time we entered into negotiations for the forwarding of cargoes on the steamships Whakatane and Pakeha.

We would not have accepted these arrangements had we known your arrangements were completed.

"You will further recollect that the contract you signed did not carry through to us and it was not until we received a copy of this contract that we really knew the details of this transaction in their entirety.

"Even at that time we had sufficient tonnage to make up this full cargo. We had warned the factory to make their experiments conclusive at the outset in the knocked down method of shipment. We had warned them that cutting down the space on the knocked down shipments during the progress of the filling of any contract would materially alter our calculations. They, however, went forward with these experiments and we really did not appreciate the extent of the saving until we came to tote up the amount of [240] space which we still had to fill on the steamer 'Cacique.'

"We accepted your notification of some time ago that we still had some 542 odd tons space to fill, believing from the nature of your communication that the W. R. Grace Company were not holding us for the full amount as you knew the measurements of our cars as going forward. When you arranged this contract with Peabody & Company for 542 tons we thought that we were absolved from further performance.

"However, if we are in for it for this 1500 odd tons space which, notwithstanding the Peabody contract which we figure we still have to take care of

upon the steamer 'Cacique,' we want you to use every means in your power to sub-let this space.

"We have suggested to you borrowing 1500 tons from the Union Steamship Company and replacing this to them later on, in addition to the 2000 tons which we still have to go forward by their steamships in fulfillment of our contract for 10,000 tons space by that line. This should be more or less easy of accomplishment with the Union Steamship Company by reason of the fact that we notice concurrent information going through from railway companies that the Union Steamship Company have obtained the steamship Florivan, sailing in July. This notice also states that the Union Steamship Company have had four of their steamers commandeered. We presume this was in addition to the steamer which you advised us would be commandeered upon its arrival at Sydney.

"We also are awaiting advice from our Australian Branch representative at Melbourne as to the reshipment of 255 cars which have been practically lost by the foundering of our sailer Normandy off the Barbadoes Islands.

"We are still awaiting advise to rewrite and reship these [241] orders and if we receive it in time we will reship them by the Cacique.

"It is not well, however, to depend upon this and we would ask you to make every effort in your power either to borrow this space from the Union Steamship Company or sub-let it on our behalf.

"We trust your endeavors in this respect will meet with success."

Letter of May 27, 1916, from Ford Motor Company of San Francisco, to respondent, reading as follows:

"Cacique—Peabody Space.

"Please refer to your letter of the 20th inst., regarding contract secured with Peabody & Company covering 542 tons for the 'Cacique.'

"We endeavored to release this space to W. R. Grace & Company, the contract to be between themselves and Peabody but this they declined to do, and as the contract specifically states that the cargo in question must be en route prior to June 1st, we are perfectly safe and the shipment will reach here in ample time to make connection with this boat."

The COURT.—We will meet to-morrow at ten o'clock.

(An adjournment was here taken until to-morrow, Wednesday, November 17, 1920, at ten o'clock A. M.)

[Endorsed]: Filed Nov. 27, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [242]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

Before Honorable MAURICE T. DOOLING, Judge.

VOLUME 3.

W. R. GRACE & CO., INC.,

Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation,

Respondent.

Wednesday, November 17, 1920.

COUNSEL APPEARING:

For the Libelant: L. T. HENGSTLER, Esq.

For the Respondent: E. J. McCUTCHEN, Esq., W. F. WILLIAMSON, Esq., and F. P. GRIFFITHS, Esq.

Mr. HENGSTLER.—I offer in evidence a letter from Ford Motor Company of San Francisco to respondent, dated May 27, 1916, reading as follows:

"We wish to confirm our telegram to you of even date as follows:

" 'Cacique will sail about July 10th.' "

Letter from Ford Motor Company of San Francisco to respondent, dated May 27, 1916, reading as follows:

"With regard to space on the 'Cacique' which you will not be able to fill and for which we are obligated, we have been doing our utmost to secure tonnage at $47.50. Our most likely [243] prospect *as* been Dodge Brothers about which we wired you on the 26th, stating that they had about 200 cars. Their San Francisco representative advised that it was his belief they would not be willing to pay $47.50, and we thought that perhaps you might be able to complete with Dodge Brothers satisfactory arrangements yourselves.

"We have been offered a shipment of pianos at $40.00 with additional brokerage fees. This cargo of pianos is on hand warehoused here in case it is necessary that we use them.

"The Illinois Central, through their San Francisco General Agent, Mr. C. Haydock, have been very active in our behalf and at present are doing through their office here everything possible to assist us in some manner, they endeavored in every way possible to induce the Union Company to allow us to take some of the cargo which they had booked for the 'Coolgardie' and 'Waimarino.'

"The writer also was in conference with the Union this morning along these lines, but unfortunately the 'Waimarino' and 'Coolgardie' sail from this port prior to the sailing date of the Cacique and, of course, the Union cannot allow us cargo intended for these boats.

"We are expecting momentarily to hear from prospects about which telegrams have been sent

East and therefore if you are able to complete arrangements in any respect, we trust that you will advise us immediately. We intend to go on and secure cargo if it is possible and if successful will promptly wire you."

Telegram from respondent to Ford Motor Co. of San Francisco, dated May 31, 1916:

"Illinois Central today informed us transfer fifteen hundred tons Union Steamship cars now on coast unshipped arranged for to Cacique advise immediately quantity being transferred by [244] Ports."

I might suggest, your Honor, that there is another file which I have not been able to see yet, and if Mr. Williamson would follow that file to see what letters I have not here, it would expedite matters.

Mr. WILLIAMSON.—I am noting the ones you are not reading.

Mr. HENGSTLER.—And you can insert any which I am not reading, though I would like to see them afterwards.

Mr. WILLIAMSON.—Do you want to see them now?

Mr. HENGSTLER.—No, afterwards; I cannot see them now.

Night letter from Ford Motor Company, San Francisco, to respondent, dated May 31, 1916, reading as follows:

"Regarding Illinois Contract. Union Company say all cars at present here will leave by Coolgardie June 1st, Waimarino or Floridian end of June.

Any cars here after July 1st, they will give to Grace provided you will guarantee sufficient cars in equal quantities spread over August Septemeber October to finish contract. Can you not complete this cargo with reshipments of foundered Normandy cargo. Wire definitely."

Letter from respondent to Ford Motor Company of San Francisco, dated May 31, 1916, signed "Pritchard," reading as follows:

"We are enclosing confirmation of our wire to you today. This follows the writer's perusal of the wire received by the Illinois Central from Mr. Haydock their San Francisco representative, indicating that the Union Steamship Company are agreeable to transfer 1500 tons cargo to the S. S. 'Cacique,' of cars which have yet to clear on the Union Steamship boats.

"We also enclose copy of draft memorandum agreement which we are forwarding through Illinois Central R. R. to the [245] Union Steamship Company in this respect.

"It is a matter of considerable surprise to us that the Illinois Central R. R. Co. should have been able to procure this concession when our own efforts failed.

"It is a further surprise to us to note that up until Saturday last, we were still led to believe that the 'Cacique' would sail on the 14th of June. This was the latest information from you. We had to do considerable wiring to get any different information.

"This is not in the nature of a complaint, but in-

dicating only the handicap such lack of information places us under at this end. This information relayed to Australia some time ago would have allayed a considerable fear on their part that shipments would arrive piling up one on the other causing congestions to a considerable degree.

"We wish you would make the fullest disclosure of anything relating to contracts, shipments and sailings in order that we may keep thoroughly in touch with you."

Mr. WILLIAMSON.—Are you going to read the memorandum attached to that letter, Doctor, and which is referred to as the enclosure?

Mr. HENGSTLER.—The memorandum referred to by Mr. Williamson reads as follows:

"In consideration of the Union Steamship Company transferring to W. R. Grace & Company for their Steamer Cacique fifteen hundred (1500) tons of our automobiles, we agree to replace these automobiles to the Union Steamship Company for carriage to Australia during the months of August, September and October under the same exigencies as set forth in the original contract entered into in this behalf, the Union Steamship Company to notify us the [246] dates of sailings in those months for the above quantity.

"We also agree to ship during the months of August, September, October, November and December approximately two thousand (2000) ton shortage upon original contracts for ten thousand (10,000) tons entered into between us under the

same exigencies governing the original contract in that behalf.

"Dated May 31st, 1916."

There is no signature to this agreement. Is it admitted, Mr. Williamson, that the Union Steamship Company never did transfer to W. R. Grace & Co., for the steamer "Cacique" 1,500 tons?

Mr. WILLIAMSON.—Yes. It is admitted that on June 1st the Ford Motor Company of Canada, Ltd., respondent here, had a wire from Haydock, and pursuant to that drafted this agreement, but the Union later did not carry it out.

Mr. HENGSTLER.—Letter of June 1, 1916, from Ford Motor Company of San Francisco, to respondent, reading as follows:

"We wired you last night as follows:

" 'Regarding Illinois Contract, Union Company say all cars at present here will leave by Coolgardie June 1st, Waimarino or Floridian end of June. Any cars here after July 1st they will give to Grace provided you will guarantee sufficient cars in equal quantities spread over August September October to finish contract. Can you not complete this cargo with reshipments of foundered Normany cargo? Wire definitely.'

'There has been a misunderstanding in this regard and receipt of your wire this morning advising the Illinois Central stated Union would be willing to allow us 1500 tons at present in San Francisco is misleading. As our wire would indicate this is not the case. [247]

"We have had this matter up on a number of occasions with the Union Company and they emphatically state that they must carry cars which are here and which are booked for their steamer 'Coolgardie' which clears today and their 'Waimarino' or 'Floridian' which will clear late in June. As they have already allotted cargoes of machines for this boat and arranged other cargo accordingly, you will see it is quite impossible for them to alter this condition.

"However, they are willing to allow us to have any cars which might arrive later than July 1st or after the 'Floridian' or 'Waimarino' sail which we can turn over to Grace & Company for the 'Cacique.' This, however, is quite uncertain and we are very much in hopes that you will be able to rewrite and reship the sailer 'Normandy's' cargo as this would very nicely complete the 'Cacique' cargo and the situation would then be nicely cleaned up."

Day letter from the Union Steamship Co. of New Zealand, Ltd., to respondent, dated June 1, 1916:

"Understand there is misunderstanding here about quantity cars you are shipping we wish it understood that all cars now in San Francisco will go forward by our own steamers and that we cannot give any of these cars to Grace Company"—

Mr. WILLIAMSON.—Doctor, that is something you did not ask me for. I left it in the file. It is really covered by my admission of a moment ago that the Union did not make the change. That is all that is embodied in that wire.

Mr. HENGSTLER.—Let me finish reading it, first.

Mr. WILLIAMSON.—But if you read it into the record you will simply confuse the record.

Mr. HENGSTLER.—It is a communication directly in line with [248] the other communications, and I would like to read the balance of it:

"Undertsand there is misunderstanding here about quantity cars you are shipping we wish it understood that all cars now in San Francisco will go forward by our own steamers and that we cannot give any of these cars to Grace Company but we are willing to give Grace portion of our consignment which has not reached us yet provided you replace the quantity we let go. Please advise exactly how many tons of cars coming forward July, August, September, October, in order we can arrange space. Your failure to carry out contract with us has caused great inconvenience to us as we have chartered at high rates to keep faith with you."

Telegram from respondent to the Ford Motor Co., San Francisco, dated June 1, 1916:

"Arrangements with Illinois Central here is that fifteen hundred tons automobiles of those already shipped are to be transferred to Grace and Company stop we are signing new contract with Union today agreeing to replace this fifteen hundred tons and ship balance of contract about two thousand tons that is thirty five hundred tons in all during August and following months as directed by Union stop we have shipped for Union two thousand one hundred twenty four Automobiles and for Grace

twelve hundred and ninety Autos stop the cars are to be transferred from those already shipped stop we have no further shipments until August first."

This telegram is out of order, but the same date as the other ones.

Mr. WILLIAMSON.—It is the confirmation referred to in the letter. [249]

Mr. HENGSTLER.—Yes.

Night letter, from respondent to Ford Motor Co., San Francisco, dated June 5, 1916:

"Advise what prospects obtaining 'Cacique' cargo stop Dodge offers thirty five have not accepted.

Night letter from Ford Motor Company, San Francisco, to respondent, dated June 8, 1916, reading as follows:

"Your night letter seventh Have you inland loadings etc will mail ocean ladings immediately on receipt from railroad covering four carloads of parts. Stop. Your night letter seventh Waihomo should read Wairuna. Sets forty one and fifty nine cleared Coolgardie third. Stop. Cacique now five days out from Shanghai Due here about twenty seventh. Three days left to discharge cargo in June. Our contract reads June loading. Does not their failure to complete loading our cars in June automatically cancel contract. That is opinion here. Stop. Unless you intend reshipping Normandy cargo we think best to stand firm on June loading."

Telegram from respondent to Ford Motor Co., San Francisco, dated June 9, 1916, reading as follows:

"Owing congestion large quantity cars arriving Australia at one time may be necessary to cut down Cacique cargo by Sydney Brisbane and Melbourne cars and ship these later stop if this is done can you arrange storage these cars Frisco or will free storage apply stop do not load any cars Cacique unless Grace agree that their default has voided any alleged contract and that forty six hundred tons less what may be held as above will be loaded at Forty seven fifty per ton and this cargo will not be held for freight for the balance stop without prejudice to this position our connections here can likely supply Cacique with other cargo at thirty five dollars." [250]

Letter from Ford Motor Co., San Francisco, to respondent, dated June 9, 1916, reading as follows:

"We wired you last night as follows:

" 'Your night letter seventh Have you inland ladings etc. will mail ocean ladings immediately on receipt from railroad covering four carloads of parts. stop. Your night letter seventh Waihemo should read Wairuna. Sets forty one and Fifty nine cleared Coolgardie third. stop. Cacique now five days out from Shanghai. Due here about twenty seventh. Three days left to discharge cargo in June. Our contract reads June loading. Does not their failure to complete loading our cars in June automatically cancel contract. That is opinion here. stop. Unless you intend reshipping normandy cargo we think best stand firm on June loading.'

"We have been investigating the matter regarding this contract and if our memory serves us correctly there is one paragraph which spoke of June loading. Of course, as you know in the parlance this might indicate June sailing but that does not necessarily follow.

"However, the Cacique at the present time is several thousand miles from here and her being a ten knot boat will not bring her here before the 27th inst. Immediately on arrival here her cargo will be discharged and she will be reloaded. We are not at present in a position to state what her cargo is from the Orient but as tea is now moving in large quantities, we presume that this will constitute the major portion, in addition to general merchandise for the Chinese stores, curious, etc.

"We figure that it will take at least three days with a large force of men to discharge her. It will then be about the 30th of June and unless our cargo is entirely aboard, it is the [251] opinion of the steamship men here, and especially our friends, the Union Steamship Company, that the contract is worth very little and if Grace & Company, as they indicated to the writer recently, intended to stand firm and collect their charges for full 6200 tons, we can no doubt stand firm and declare our contract automatically cancelled.

"Would like to hear from you along these lines, giving any instructions you would like to have this department carry out."

Mr. WILLIAMSON.—Doctor, the word "intended," the "ed" is stricken out in the original;

that being a carbon copy you are reading from, I presume it was not stricken out there. Very evidently a change was made by the writer before the letter was sent.

Mr. HENGSTLER.—All right; then it should read: "intend to stand firm," instead of "intended to stand firm."

Telegram from respondent to Ford Motor Co., San Francisco, dated June 9, 1916, reading as follows:

"We have already written Grace and Company that sailing date in July voids any contract even admitting there is one binding on this Company which we do not. Stop. From the outset we have made it clear that we consider ourselves bound for four thousand and seventy-six tons plus Peabody space that is forty-six hundred tons. Stop. Before any cars loaded on Cacique see that this understood with Grace so that the loaded cargo will not be held for entire freight; otherwise do not load any. Stop. If Grace wish us to assist them without prejudice to this position we can possibly arrange other cargo here thirty-five dollars per ton."

Telegram from respondent to Ford Motor Co., San Francisco, [252] dated June 10, 1916, reading as follows:

"Our wire ninth have decided to not hold up shipments to Sydney Brisbane Melbourne stop Will load forty six hundred tons all told provided Grace agree this is in fulfillment of any contract and will not hold what loaded for entire freight."

Night letter, Ford Motor Company, San Fran-

cisco, to respondent, dated June 13, 1916, reading as follows:

"Grace insist on sixty two hundred tons or freight on unused space. They intimate suit and will probably attach all cars here. They say you have nothing to stand on. Please give us copies of all correspondence you have with Grace. Cacique left Shanghai June fifth. Last report June eighth she was seven hundred fifteen miles out. Wire instructions."

Letter of June 22, 1919, from Ford Motor Co. of San Francisco, to respondent, reading as follows:

"We have not heard from you regarding the 'Cacique' situation. The boat is nearing this port and we are still wondering what you intend to do.

"Our attorney here is strongly of the opinion, as we wired you, that phrase 'June loading' means that the entire consignment must be put aboard the vessel in June. The writer has interviewed several steamship companies and the opinion seems to carry through each one.

"Davis and Cornyn, from whom you recently received wire regarding one thousand tons, now offer about 16,000 cases of oil for Wellington, Sydney and Melbourne. This is eight thousand tons but the commodity does not carry a very substantial rate,—$24.00 being about the most we can figure on. Of course, we have no authority here to give them any satisfactory answer and they must have their reply as quickly as possible. [253]

"We have issued instructions to the Southern Pacific Company, who now have in their possession

all of the consignment for the 'Cacique,' to hold same until they receive from us instructions to deliver to Grace and Co.

"It is our impression that W. R. Grace and Co., will bring suit and, as previously advised, attach the shipment. In the writer's recent conversation with Mr. Carter, the president of the local company, the gentleman stated his intention of writing to Mr. J. H. Rossiter, who is the head of Grace and Company giving him all the data on the case and requesting him to stop off at Detroit on his return to San Francisco and there consult Mr. Henry Ford as to the proper steps to take. He stated that he did not think Mr. Ford would agree to any such actions on our part, as he stated, in not keeping good faith to our contract.

"We are merely giving you this for your information so that you may know the feeling that exists in Grace and Company's office here.

"The writer does not think that any such action will be taken by Mr. Carter but he does think that Grace and Company intend to demand from us the full price of 6200 tons."

Letter from Ford Motor Co. of San Francisco, to Mr. W. J. Hardie, Southern Pacific Co., Fourth and Berry Streets, San Francisco, Cal., dated June 22, 1916:

"Dear Sir: Attention Mr. Frank Renz, Steamer Clerk.

"Confirming our telephone conversation of recent date: Until you are advised to do so, please do not, under any circumstances, deliver any of the cargo

at present on hand booked steamer 'Cacicue' to W. R. Grace & Co.

"FORD MOTOR CO.,
"Traffic Department.
"L. C. DAVIS." [254]

Telegram from respondent to Ford Motor Company, San Francisco, dated June 24, 1916:

"Advise if Grace are owners 'Cacique' or merely brokers for owners; rush reply day wire."

Telegram from respondent to Ford Motor Co., San Francisco, dated June 26, 1916, reading as follows:

"Advise rush day message whether 'Cacique' is American vessel where and under what flag registered stop will give full instructions what course to follow night message tonight."

If your Honor please, I have not the other file yet. If your Honor will grant me a minute, I will ask Mr. Williamson whether there are any additional letters in it.

Mr. WILLIAMSON.—Most of these are duplicates. Of course, I did not know that you were not reading them all. You can take this file and take anything out of it you may wish. Most of them are duplicates. Some of them, I know, are missing; necessarily, each office makes up its files a little differently. For instance, here is a letter from Mr. Davis under date of April 3d. I don't know whether you read that, or not. I can tell you what you did not read this morning, because I have kept track of it. Here is a letter of June 22, which you

did read, the Grace & Co. letter of June 22, which is already in the record.

Mr. HENGSTLER.—I think these letters have a bearing. I cannot determine at the present time, however, about all these, I would like to go through them. Here is something I would like to have in the record.

Telegram from respondent to Ford Motor Co., San Francisco dated June 28, 1916, reading as follows: [255]

"Johnson and Higgins underwriters 'Cacique' insurance will see you. Stop. Have them consult Williamson and Sutro. Stop. They may have certain rights to insist upon before loading 'Cacique' which would help."

Mr. WILLIAMSON.—Now, this letter you are looking at, Mr. Hengstler, will not be understood unless I make a statement about it.

Mr. HENGSTLER.—Let me look at it first.

Mr. WILLIAMSON.—But the record will be confused, unless I make a statement about it.

Mr. HENGSTLER.—I will say now that I will not use any of these unless they become important to the case.

The COURT.—Has it to do with the action already begun?

Mr. WILLIAMSON.—Yes, your Honor, with the action already begun. I would like to state, so that the record is not going to be encumbered by something we cannot explain at some later date, I will say to your Honor—

Mr. HENGSTLER.—It is not even necessary to explain it, Mr. Williamson, unless I use it. I will not use it unless something comes out in the defense which will make it of importance.

The COURT.—Well, let us hear it.

Mr. WILLIAMSON.—After the suit was filed, we wired the contents of the bill to the Ford Motor Co. of Canada, and made immediate effort for Johnson & Higgins to get bonds to release the cargo.

Mr. HENGSTLER.—I desire to offer in evidence a letter from respondent to Ford Motor Co., San Francisco, dated June 13, 1916, and reading as follows: [256]

"We have received letter from Messrs. W. R. Grace & Company, of which attached is a copy. This letter refers to letter of June 6th to yourselves. We are enclosing copy of our letter to Messrs. W. R. Grace & Co. in reply.

"Will you please also write Messrs. Grace & Company and inform them that the 4075 odd tons is the full cargo for the S.S. 'Cacique'; that we recognize no contract binding upon this Company to forward 6200 tons for this vessel, and that unless the 4075 tons is taken on this understanding, and not subject to freight for 6200 tons, we will not load any of this cargo."

I offer in evidence a letter from Ford Motor Co., San Francisco, to respondent, dated June 7, 1916, reading as follows:

"We wired you yesterday as follows:

" 'Coolgardie delayed account longshoremen's strike. Cleared third Set numbers 32 to 46 in-

clusive, 48 to 50 inclusive, 52, 53, 55, 57, 59, 138 A and B, 140 A and B, 141 to 143 inclusive, 145, 146, 147B. Total freight charges including parts Eighty Three Thousand Six Hundred Nine Dollars Sixty Cents. stop. Our best prospect for Cacique is Dodge. Endeavor to close best possible figure. Get freight moving. Grace now figure 'Cacique' will clear about July fifth.'

"As indicated the Coolgardie was delayed account longshoremen's strike which is still unsettled.

"Referring to your letter of the 31st enclosing copy of contract which you advise Illinois Central secured, you have undoubtedly been advised of the true state of affairs ere this writing and we do exceedingly regret this unfortunate misunderstanding, but our previous wires to you have not deviated from our original stand in any way and we have correctly informed you as to the stand which will be taken by the Union Steamship Company. [257]

"It now transpires as you know, the rates are going down to a more normal basis and it is impossible for us to secure tonnage at $47.50, although we have had offers of $35.00.

"We sincerely hope that you will be able to fill the space with your own cars rather than let it go to any other concern for a lower figure.

"Regarding the change of dates of Cacique sailing, information has come to us which had not previously been made public to the effect that the Cacique had met with an accident after leaving Vladivostok, Russia, which necessitated repairs and again it was necessary to put her on the ways in

Hong Kong which further delayed the boat and we were only recently informed of this change, although the movements of the boat had let us to believe that it would be much later than the middle of June before her departure, and it is now our hope that she will even be as late as the 10th of July as we wired you recently.

"FORD MOTOR COMPANY.
"Traffic Department,
"L. C. DAVIS."

A wire from respondent, to Ford Motor Co., San Francisco, dated June 5:

"Advise what prospects obtaining Cacique cargo. Stop. Dodge offers thirty-five. Have not accepted."

A letter from respondent to Ford Motor Co., San Francisco, dated June 3, 1916, reading as follows:

"In accordance with Mr. Grandjean's letter of even date and following our procedure outlined therein, we are sending you under separate registered mail today three copies of all invoices covering autos and parts and two copies of all bills of lading covering same which we expect to go forward on the following steamers— [258]

| | |
|---|---|
| Coolgardie | June 3rd |
| Waimarino | June 30th |
| Cacique | July 12th |

"Trusting these documents will arrive in good order, we are," etc.

Who is Mr. Grandjean?

Mr. WILLIAMSON.—He is one of the Sales Department of the respondent.

Letter from Ford Motor Co. of San Francisco, to respondent, dated May 27, 1916, reading as follows:

"We are in receipt of advice from Mr. J. G. Stubbs, General Agent Southern Pacific Company, San Francisco, in which he advises receipt of telegraphic communication from Mr. R. S. Stubbs of New York to the effect that Muller-McLean Company offer $40.00 per ton for twenty to thirty automobiles July clearance Australia and New Zealand.

"We have not signified our intention of accepting this offer but merely submit it to you for your information.

"If you care to go further into the matter, please advise us by wire."

Telegram from respondent, to Ford Motor Co., San Francisco, dated May 27, 1916, reading as follows:

"Advise day message date of Cacique sailing."

Letter, from Ford Co. of San Francisco to respondent, dated May 26, 1916, reading as follows:

"This will confirm our night letter to you under date of May 24th as follows:

" 'Your wire yesterday. We have already contracted for five hundred forty two tons with Peabody. Are now endeavoring to secure about one thousand tons. Thus far unable to get Forty Seven Fifty although sufficient tonnage is offered. Best quotation to [259] date probably Forty two Fifty."

Telegram from respondent, to Ford Motor Co., San Francisco, dated May 26, 1916, reading as follows:

"Cacique total cargo from factory will be four thousand and seventy-five tons—Advise immediately when vessel sails—also what amount of shortage you can dispose of and figure—Hurry please."

Telegram from respondent to Ford Motor Co., San Francisco, dated May 25, 1916, reading as follows:

"Deny we are offering space New York except for August sailing."

Telegram, from respondent to Ford Motor Co., San Francisco, dated May 23, 1916:

"Do everything possible to sublet Cacique fifteen hundred tons if cannot borrow from Union as it looks as if we cannot get out the thousand tons additional of which we advised yesterday. Stop. Advise prospects immediately."

Telegram from respondent to Ford Motor Co., San Francisco, dated May 22, 1916, reading as follows:

"Cannot give you balance of contract in July not likely until August and following months. Stop. We notice that 84 Brisbane 108 Howard 84 Sydney originally scheduled for Wairua do not appear to be clearing by Wairuna. In view of Union being behind on its schedule would it not be possible to transfer these cars to Cacique and replace to Union later on in year? Advise."

Telegram, from respondent to Ford Motor Co., San Francisco, dated May 19, 1916:

"Advise Grace Sydney 762 tons Wellington 1188 tons. Stop. Will likely give about another thousand tons for Melbourne making [260] fifty seventy-five tons shipped from here leaving a short-

age of about six hundred tons. Stop. See if you can arrange Union to take this shortage from cars shipped for steamers not yet sailed or that should have gone on steamers already sailed replacing to Union Company later. Stop. Have Grace communicate with Sutton Company direct."

Telegram from Ford Motor Co., San Francisco, to respondent, dated May 19, 20th, 1916, reading as follows:

"Please reply our wire seventeenth regarding total tonnage for Cacique must know how much space to fill stop Understand Francis M. Sutton seventeen Battery Place New York has car for Australia please ascertain and advise."

Telegram, from Ford Motor Co., San Francisco, to respondent, dated May 18:

"Your wire May fifth indicates five thousand eighty seven tons total for Cacique May sixteenth you advise total four thousand eighty four tons wire immediately exact Cacique tonnage in order we can contract for Unused space probability unable secure rate forty seven fifty unless we can complete cargo we will have severe loss please advise definitely."

Night letter, respondent to Ford Motor Co., San Francisco, dated May 16, 1916, reading as follows:

"Total Cubic measurement on shipments for 'Cacique' for Sydney seven Hundred and Sixty-one tons—Wellington One Thousand and One Ninety tons, other ports Two Thousand and seventeen tons four carloads of parts One Hundred and sixteen tons—Total Four Thousand Eighty-four tons."

Telegram from Ford Motor Co., San Francisco, to respondent, dated May 15, 1916, reading as follows: [261]

"Your letter fourth mailed New York by mistake concurrent letter advising ports and quantities not received. Please wire without fail Tuesday morning total cubic measurement shipments for Cacique for Wellington and Sydney stop Grace and Company must have this information immediately to figure steamers stowage and further cargo requirements."

Letter, Ford Motor Co., San Francisco, to respondent, dated May 13, 1916, reading as follows:

"We are enclosing herewith copy of letter received from Henry W. Peabody & Company, San Francisco, which has direct reference to our contract with them covering 542 tons space on the Steamer 'Cacique.'

"Kindly advise us your opinion regarding this feature, and oblige."

I offer in evidence an agreement made in letter form between respondent and Henry W. Peabody, reading as follows:

"San Francisco, May 5, 1916.

"W. R. Grace & Company's SS. 'Casique.'

"This agreement is entered into by Henry W. Peabody & Company, 255 California St., San Francisco, and the Ford Motor Company of Canada, Ltd., Walkerville, Ontario, and covers 542 measurement tons of 40 cubic feet each per W. R. Grace & Company's SS. 'Cacique,' loading at San Fran-

cisco about July 1st for Sydney and Wellington. Cargo for said space to be delivered alongside of steamer at San Francisco as fast as vessel can load, otherwise shipper to pay demurrage at the rate of $3,000.00 per day. Freight to be prepaid at rate of $47.50 per ton of 40 cubic feet measurement.

"FORD MOTOR COMPANY OF CANADA, LTD.,

"By L. C. DAVIS. [262]

"Accepted.

"HENRY W. PEABODY & CO.,

"J. B. CARLTON."

There is a foot-note to that agreement, as follows:

"It is further agreed that demurrage mentioned above is only payable provided cars do not leave Factory before June 1st, 1916, and it is also agreed that entire shipment will be in transit not later than June 1st."

Letter, from respondent, to Ford Motor Co., San Francisco, dated May 11, 1916, marked "Dict. May 10th":

"We refer you to our letter of April 28th in which we asked you to ascertain how many cars the Union Steamship Company contemplated they would shortship on our contract.

"If you find that the Union Steamship Company are not going to be able to take care of our contract to the end of May as anticipated, we want these transferred to S. S. Cacique.

"All of our Union Steamship cars must go by the end of May."

Letter, from respondent to Ford Motor Co., San Francisco, dated May 6, 1916, reading as follows:

"In order as far as possible to approximately fill our reservation by this boat it will be necessary for us to turn down extremely favorable rates out of the Port of New York.

"We wish you would let Grace & Company know this.

"We enclose copy of wire received from our New York Foreign Department in which they quote us a firm rate of $40.00 out of New York. You will understand how extremely favorable this rate is when we have so much less inland freight to pay."

Telegram from Ford Motor Co., San Francisco, to respondent, dated May 2–3, 1916, reading as follows:

"Your wire today Cacique contract still 540 tons short [263] can you complete it otherwise we must secure other cargo at probable loss please reply immediately."

Wire from respondent to Ford Motor Co., San Francisco, dated May 1, 1916, reading as follows:

"We start Cacique contract today—writing full particulars as to quantity ports and dates of shipments 1316 cars in all. Sending list showing railway cars comprising four thousand and six thousand ton contract."

Telegram, from Ford Motor Company, San Francisco, to respondent, dated April 3, and apparently received on the 4th, reading as follows:

"Refer our letter March first enclosing contract with W. R. Grace their Steamer Cacique we are

definitely compromised for sixty-two hundred tons for this vessel otherwise dead freight will be payable on any unshipped quantity."

Telegram, from Ford Motor Co., San Francisco, to respondent, dated March 29–30, 1916, reading as follows:

"Your wire yesterday Steamer Cacique goes Wellington Sydney only; see contract; you should arrange sixty-two hundred tons accordingly arbitraries as advised."

Letter, from respondent to Ford Motor Co., San Francisco, dated March 28, 1916, reading as follows:

"S. S. Cacique.

"We are enclosing confirmation of wire to you, which intimates that we have no further needs until July. We mean by this, that we will not ask you to go actively into the market until about that time in anticipation of our needs commencing August 1st when a new contract year commences with our Australian dealers.

"You stated some time ago that you had arranged for the [264] S. S. Cacique, of which the capacity was 6200 tons. As indicated to you, we will need only 4284 tons of this capacity.

"That we do not need the 6200 tons, is due to the fact, that we have succeeded in obtaining two steamers from the New Zealand Shipping Company, one sailing out of St. John on the 20th of April and one sailing out of Montreal on the 20th of May, taking a considerable number of cars which otherwise would have had to go by Steamer Cacique

(Testimony of Harvey E. Moore.)

and by other arrangements out of the port of San Francisco."

The COURT.—We will meet at two o'clock.

(A recess was here taken until two o'clock P. M.) [265]

AFTERNOON SESSION.

**Testimony of Harvey E. Moore, for Libelant (Recalled).**

HARVEY E. MOORE, recalled for the libelant.

Mr. HENGSTLER.—Q. Mr. Moore, relative to the 1100 packages which were deposited by the Southern Pacific Company on the "Cacicue" wharf on June 22, 23, and 24, what communication, if any, did you have with officers or representatives of the Southern Pacific Company?

Mr. McCUTCHEN.—I object to that as irrelevant and immaterial. That freight is alleged to have been received, or those packages are alleged to have been received as freight, and it has been testified by the manager of Grace & Co. positively and unequivocally that they were in the hands of Grace & Co. on the day on which this libel was filed as freight.

The COURT.—The objection will be overruled.

A. I am unable to fix the date positively, but about that time I received a telephone message from—

Mr. McCUTCHEN.—One moment: About what time?

A. About the time that Mr. Hengstler mentions, June 23d, or 24th, sometime in that locality.

(Testimony of Harvey E. Moore.)

Mr. HENGSTLER.—Mr. McCutchen, we will admit that the Southern Pacific Company deposited those packages on June 22, 23 and 24, altogether 1100 packages, that were deposited on the wharf.

Q. Go ahead.

A. I received a telephone message form the local office of the Southern Pacific Railway Company, I think from Mr. Renz, stating that the delivery of that cargo to the "Cacicue" had been held up, on instructions received, I believe, from the Ford Motor Co., [266] or from Mr. Davis, I don't remember which. I immediately went out to Mr. Hardy's office—Mr. Renz was an employee of Mr. Hardy's office—and Mr. Renz confirmed to me what he had told me by telephone, and he introduced me to Mr. W. J. Hardy, the agent of the Southern Pacific Company, who confirmed what Mr. Renz had told me, and they were both considerably disturbed.

Mr. McCUTCHEN.—One moment. I object to that.

The COURT.—Yes.

Mr. HENGSTLER.—Say as nearly as you can what they did—what they said, as nearly as you remember it.

Mr. McCUTCHEN.—One moment; I object to that upon the further ground that we are not bound by conversations.

The COURT.—Yes. The only thing that is material is the fact, itself. I am not quite sure that that is. It may have some bearing on the commencement of the action; that is the only way I can see it

(Testimony of Harvey E. Moore.)

has any bearing; the fact, itself, is the only thing that is material; the details of it, and how much they were disturbed over it, is not material at all.

Mr. HENGSTLER.—Q. Did they tell you how these packages happened to be deposited by them on the wharf?

Mr. McCUTCHEN.—One moment. I object to that. The packages were there.

The COURT.—The objection will be overruled.

A. I don't remember that they did. Mr. Hardy asked me if he could get back the packages which had been delivered to the wharf, and I told him that I had no authority in the premises whatsoever.

Q. Will you try, if you can, to remember whether they did give you a reason—whether they did give you information as [267] to how it happened that those cars were deposited on your wharf?

Mr. McCUTCHEN.—I object to that as irrelevant, immaterial and incompetent.

The COURT.—The objection will be overruled.

Mr. McCUTCHEN.—May I be heard just a moment: I object to that on the further ground that the witness has been asked what they said to him, and he has repeated it as nearly as he can remember.

Mr. HENGSTLER.—I am asking him—

Mr. McCUTCHEN.—The witness should not be cross-examined by counsel.

The COURT.—The objection will be overruled.

A. My recollection is that some of this freight was delivered to the wharf after they received this notice from the Ford Co. to hold it up, and Mr.

(Testimony of Harvey E. Moore.)

Hardy and Mr. Renz were very much agitated over it.

Mr. McCUTCHEN.—I ask that that be stricken out.

The COURT.—Let it go out.

Mr. HENGSTLER.—Q. But they told you that the Southern Pacific Company wanted those packages back, did they?

A. They did.

Q. What did you do after you had that conversation with Mr. Hardy and Mr. Renz?

A. Returned to our office and reported the matter to Mr. Carter.

Mr. HENGSTLER.—That is all.

Cross-examination.

Mr. McCUTCHEN.—Q. Am I correct in my recollection of your testimony of the other day, that it was to the effect that after your return from the East you had very little to do with this [268] transaction, and that it was conducted by others?

A. It was some time after I returned from the East; I don't remember just when I got out of it.

Mr. HENGSTLER.—I don't think he testified to that.

Mr. McCUTCHEN.—No further cross-examination.

**Testimony of G. H. Carter, for Libelant (Recalled).**

G. H. CARTER, recalled for the libelant.

Mr. HENGSTLER.—Q. Mr. Carter, you heard what Mr. Moore testified just now. Will you kindly

(Testimony of G. H. Carter.)

tell the Court what the report was which you received from Mr. Moore after his interview with the Southern Pacific Co.?

Mr. McCUTCHEN.—I object to that as irrelevant and immaterial. Mr. Moore says that he gave him that information.

The COURT.—The objection will be overruled.

A. Mr. Moore reported that he had had this telephone from the Southern Pacific Office, and had been there, and had called and had learned that this cargo then on the dock had been delivered by them by mistake, and they wanted it returned; this in view of the fact that they had received instructions from the shippers not to deliver the cargo.

Q. Did you, or W. R. Grace & Co., at any time thereafter receive any notice from the Ford Motor Co., or anybody acting for the Ford Motor Co., advising you that these cars were now available for shipment on the "Cacicue"? A. No.

Mr. HENGSTLER.—That is all.

Cross-examination.

Mr. McCUTCHEN.—Q. You did not comply with any request of the Southern Pacific Company on that subject, if any such was made to you?

A. No, we did not. [269]

Q. But you proceeded two days after that to foreclose a maritime lien upon those packages, didn't you? A. Yes.

Mr. McCUTCHEN.—That is all.

Mr. HENGSTLER.—The libelant rests.

The COURT.—I don't know that it is quite clear to the Court that it can be ascertained from the case of the libelant how much they are entitled to, if entitled to anything, as the matter stands now; I don't know how much freight they took, or at what rate.

Mr. HENGSTLER.—I took it for granted, your Honor, that the usual rule of this court would be followed, that the damages would be ascertained by a reference.

The COURT.—That can be done. I thought, though, if you had a memorandum, as suggested by counsel, as to what freight was carried in this space, and what was received for it, that might obviate the necessity of a reference. You can pursue the other course, if you desire.

Mr. McCUTCHEN.—I think that would be very simple, and the Court could dispose of the whole matter. That was the reason I made that suggestion.

The COURT.—There was some suggestion of counsel that you prepare a memorandum and submit it to him, and that they could probably agree on the figures.

Mr. HENGSTLER.—If your Honor prefers that we do so, and counsel desires it, we will prepare that memorandum.

Mr. McCUTCHEN.—By the way, I would like to get one thing clear while we are on that subject. The prayer is for a judgment of $319,000, is it not?

Mr. HENGSTLER.—I have forgotten what the amount of it is; it is mentioned in the libel. [270]

(Testimony of L. C. Davis.)

Mr. McCUTCHEN.—The amount due, and which would have been payable on the 6200 tons of freight at $47.50 a ton would have been $294,500. I would like to know from counsel how they make up that difference.

Mr. HENGSTLER.—I don't know if that is material at the present time. We afterwards reduced the amount of the bond, when we could not ascertain at that time what the amount of the damage was, except roughly. We afterwards reduced the amount of the bond very considerably, when we found that the amount would be less.

Mr. McCUTCHEN.—Was there not in that $319,000 quite a considerable sum for demurrage?

Mr. HENGSTLER.—I could not say that now without looking up the records and consulting with Mr. Carter. I think it was a very rough estimate of what the damages might amount to. But I have relied upon the usual practice of the Court, your Honor.

The COURT.—That is all right, I have no objection.

**Testimony of L. C. Davis, for Respondent.**

L. C. DAVIS, called for the respondent, sworn.

Mr. McCUTCHEN.—I might say, your Honor, I don't think, in view of the developments that have already been had, that there is any necessity or that any purpose would be served by the making of an opening statement by us.

Q. Where do you reside? A. In Oakland.

(Testimony of L. C. Davis.)

Q. What is your business? A. Exporting.

Q. With what house are you associated?

A. The General Motors Export Co.

Q. How long have you been associated with that corporation? [271] A. A little over a year.

Q. Prior to that time, what was your occupation or business?

A. I was traffic manager for the Chevrolet Motor Co., of Oakland, California.

Q. For what length of time, approximately?

A. Three years.

Q. And prior to that?

A. I was head of the traffic department of the Ford Motor Co.

Q. In San Francisco?

A. In San Francisco; yes.

Q. Were you in that department, that is to say, the traffic department of the Ford Motor Co. in San Francisco during the whole of the month of February, 1916, and from that time and including the whole of the month of July, 1916? A. I was.

Q. But you have not been associated or connected with the Ford Motor Co. since when?

A. October 1, 1916.

Q. October 1, 1916? A. Yes.

Q. You have been in the courtroom here a good part of the time while the case has been going on?

A. Yes.

Q. Are you the Mr. Davis referred to in the correspondence that has been read here?

A. I believe I am.

(Testimony of L. C. Davis.)

Q. Did you, during the month of February, 1916, meet Mr. Moore or Mr. Carter, of Grace & Co.?

A. Yes.

Q. Just state to the Court in your own way when you met those gentlemen, or either of them, and what your conversations with them were; I speak now of the month of February.

A. I don't remember just what date it was in February that I first met Mr. Moore, of the Grace Company, but at that time I was looking for space for automobiles to Australia, and knowing, of course, that Grace & Co. were steamship owners, and the fact that I had seen numerous other steamship owners in the city, and with the assistance of various railroad officials, and particularly [272] Mr. Meyers, I was taken by him to Mr. Moore's office, and there I met Mr. Moore.

Q. What did you tell Mr. Moore you wanted at that time?

A. I don't remember the exact conversation.

Q. Well, in substance; I am not asking you for the identical language that you used.

A. That I was looking for some space for automobiles for Australia for June of that year. I had secured space in other companies for previous months, and it now developed that I had to have some space for June.

Q. Did you tell him for whom you wished the space? A. I did.

Q. For whom did you tell him?

A. For the Ford Motor Co., of Canada.

(Testimony of L. C. Davis.)

Q. Well, at that time, or at any other time subsequent to that, did you show him any communication, that is to say, letters or telegrams, from the Ford Motor Co. of Canada?

A. I had a telegram from the Ford Motor Co. of Canada, in which they advised they wanted, if I remember correctly, some odd 6000 tons for June, and I showed that telegram to Mr. Moore.

Q. Well, what happened at that time, if anything?

A. Well, Mr. Moore could not tell me definitely at that time anything about whether he could favor me or not for those 6200 tons for June sailing, but that we would have to let it go until they could figure out their various ships.

Mr. HENGSTLER.—Q. Did you say for June sailing?

A. Yes. As I recall, there was a map on Mr. Moore's wall, in his office, which had all the ships on it, of their company, and the location of each, and on this map these ships were moved from day to day, scheduled, more for his information, so that he could presumably tell where the ships would be or destined. But there was nothing definite, as I remember, arranged [273] upon that day, that first meeting.

Mr. McCUTCHEN.—Q. Did you go to the office after that? A. I did.

Q. Did you have a talk with Mr. Moore upon that second call?

(Testimony of L. C. Davis.)

A. Well, I talked with Mr. Moore about it every time I went there.

Q. Well, did you get any information from Mr. Moore then as to whether Grace & Co. would be able to furnish you space for the purpose for which you were seeking it? A. Yes.

Q. What was that information, what did he say to you, in substance?

A. We were looking over the map, and it seemed that the "Cacicue" was about the only boat that we could figure on which would arrive here for June sailing. As I recall, she was then on her way from the East Coast to this port, and then for Vladivostok, and her round trip would bring her back into this port about June.

Q. Do you remember whether the date in June was mentioned, or any date in June was mentioned?

A. Well, there was something said about a date, but I cannot recall what date it was.

Q. There have been offered here, Mr. Davis, some letters and telegrams sent by you to the Ford Motor Co. of Canada, in one of which the date June 24th is mentioned, and in another of which the date June 14; while I do not attempt to state it with accuracy, at least one of those telegrams was in answer to a telegram from the Ford Motor Co. of Canada, as to the date of sailing. With those telegrams and letters in mind, can you give us any impression as to the information given to you by Mr. Moore regarding the date when the

(Testimony of L. C. Davis.)

boat or ship would probably sail from San Francisco on her June voyage?

A. As I recall, it was necessary for the Canada factory to know the dates of sailing, the name of the vessel, the port [274] of call, and that sort of thing, and it seems to me, if I remember, I was told that it would sail somewhere around the 24th of June, or around the 14th—or the 24th, I should say; but I don't remember exactly that conversation.

Q. Can you state whether or not it was pursuant to that information you received from Mr. Moore, or from the office of Grace & Co. and Moore, that you made these communications to the Ford Motor Co. of Canada? A. Yes.

Q. When you had your various conversations with Mr. Moore, or any other representative of Grace & Co., did you exhibit to him the communications which you had had from the Ford Motor Co. of Canada? A. I did.

Q. Do you remember whether at any time Mr. Moore asked you what your authority to engage that space was?

A. I believe that that question was asked me.

Q. Now, if you have any recollection upon the subject, can you state what you did in answer to that question?

A. I could only act on authority from the Ford Motor Co., of Canada.

Q. Did you so tell Mr. Moore? A. Yes.

Q. You have examined the file of correspondence

(Testimony of L. C. Davis.)

passing between you and the Ford Motor Co. of Canada with reference to this transaction, haven't you, Mr. Davis? A. Yes.

Q. Do you recall whether or not the telegram which I show you, and which is dated February 25, was received by you from the Ford Motor Co. of Canada? A. Yes.

Q. This is one of the telegrams read by counsel on the other side. You do remember that that telegram was received by you? A. Yes. [275]

Q. Will you state whether or not you made any reply to it? A. Yes.

Q. What is the date of your reply?

A. February 27th.

Q. That has also been read by counsel for libelant. Have you any recollection as to whether you exhibited to Mr. Moore the telegram of February 25 from the Ford Motor Co. of Canada to you?

A. Yes.

Q. To refresh your recollection, your Honor, that telegram reads: "Accept Grace offer sixty two hundred tons. Confirm advising names and dates of sailing." When did you show to Mr. Moore this telegram of February 25 with reference to the time when you signed the contract?

A. I showed Mr. Moore that the day I received it.

Q. The contract, or what is claimed to be the contract, is dated February 25. I don't think there is any impropriety, your Honor, in my putting a leading question to the witness here. Was it at that time when you signed the contract which bears

(Testimony of L. C. Davis.)

date February 25 that you showed Mr. Moore this telegram?

A. I must have shown it to him that day.

Mr. HENGSTLER.—I would not be too leading in this, Mr. McCutchen.

Mr. McCUTCHEN.—Here is a transaction that took place four years before; this witness no longer has any relation to the business in which it arose, and I really think that I was not guilty of any impropriety in putting that question.

The COURT.—What is the answer.

(Answer read by the reporter.)

Mr. McCUTCHEN.—Q. That was your authority to sign the contract, was it not, Mr. Davis?

A. Yes.

Q. Can you tell us whether you signed that contract before you received this telegram?

A. I did not. [276]

Q. The telegram of February 27 reads, in part, and that is the one which the witness says was sent in reply to that of the 25th, asking for the sailing date: "Have signed with Grace American Steamer 'Cacicue' about June 24." That is not all the telegram, but it is the first line. Now, can you state whether the information contained in this telegram of the 27th of February, reading, "Have signed with Grace American Steamer 'Cacicue' about June 24," was given to you by Mr. Moore?

A. As Mr. Moore was the only man that I was talking to in Grace & Co., it must have been.

Q. Did you or not convey the information to the

(Testimony of L. C. Davis.)

Ford Motor Co. of Canada, just as Mr. Moore had given it to you? A. I did.

Q. There have been read here this morning—possibly some of it was read yesterday—some letters and telegrams, one or both, written by you to the Ford Motor Co. of Canada, in which you gave sailing dates. Will you state whether the information conveyed in those communications was given to you by Mr. Moore or by someone else in the office of Grace & Co.?

A. I don't remember whether it was Mr. Moore that gave me the information.

The COURT.—I think your question is confusing. I think it may be. The witness is trying to distinguish whether the information came from Mr. Moore or somebody else in Grace & Co. I thought you wanted to know if it came from anybody in Grace & Co.

Mr. McCUTCHEN.—Yes.

Q. Did the information which you conveyed in these letters come from someone in the office of Grace & Co.? A. Yes. [277]

Q. Would it be fair to say that you knew nothing about the date on which that ship would sail except as you got it from Grace & Co.?

A. Yes, it would be fair.

Q. Did you visit the wharf at which the "Caicue" landed before she actually landed there, or on the day that she arrived there?

A. I don't remember what day it was, but I did visit it.

(Testimony of L. C. Davis.)

Q. Did you visit the wharf subsequent to her arrival there? A. Yes.

Q. What was its condition with reference to freight being piled upon it? A. It was congested.

Q. Very badly congested? A. Yes.

Q. With cargo that had been taken out of the "Cacicue"?

A. I think it was taken out of the "Cacicue," but I am not positive.

The COURT.—Of course, that would not imply a very early visit.

Mr. McCUTCHEN.—No.

Q. Were you there on the 27th, if you remember, of June? A. I could not say positively.

Q. Were you there on the 28th?

A. I was there a very short time after the arrival of the ship.

Q. Were you there prior to the 1st of July?

A. Yes.

Q. You are quite positive of that? A. Yes.

Q. When you went there prior to the 1st of July, what was the condition of the wharf, with reference to freight being piled upon it?

A. It was congested, piled very high in some places.

Q. Would you call it a very decided congestion of freight? A. I would.

Mr. HENGSTLER.—I object to that, if your Honor please, "a very decided congestion of freight." That is a matter of opinion [278] and judgment.

(Testimony of L. C. Davis.)

The COURT.—Let it stand.

Mr. HENGSTLER.—We are willing to admit there was freight there, if your Honor please.

Mr. McCUTCHEN.—Take the witness.

Cross-examination.

Mr. HENGSTLER.—Q. Mr. Davis, do you remember that you were in my office about a week ago? A. I do.

Q. Who was present at the time, Mr. Davis?

A. Mr. Moore and Mr. Florentine, and yourself.

Q. Do you remember that you told me on that occasion that these events having happened so long ago you did not have any clear recollection of any of them?

A. Well, I don't know as I remember those exact words, or not.

Q. Well, what did you say with reference to that?

A. I don't recall.

"Q. Mr. Davis, do you remember that you told me in the presence of Mr. Moore and Mr. Florentine on that occasion that there was one feature that you remembered distinctly, namely, that no exact time for the arrival of the 'Cacicue' was intended to be stipulated, on the ground that it was impossible, so long ahead, for any steamship man to fix any time?

A. For the arrival of the steamer?

Q. Yes. A. I believe I did."

Q. You said that you did not intend to make any contract with W. R. Grace & Co. at the time for the arrival of that steamer or the loading of that

(Testimony of L. C. Davis.)

steamer on any exact date, by reason of the fact that that would be impossible to do so long ahead. You remember that you said that, don't you?

A. I don't recall that, Mr. Hengstler.

Q. Don't you remember that you said that no steamship man could [279] possibly foretell four months ahead the time of arrival of a steamer at any particular time, and that for that reason it was not intended to make any contract for her arrival on any particular date?

A. I don't remember of making such a broad statement as that, about being a steamship man.

Q. What did you say with reference to that?

A. I am very sorry, but I cannot recall.

Q. Do you remember that you, yourself, suggested that since you knew that two voyages would intervene between the 25th of February and the expected arrival of the "Cacicue," that a great many things might happen to steamers on voyages, and, therefore, it would have been impossible to state when that steamer would arrive in San Francisco, that it could only be approximate?

A. I remember something about stating that there might be many things happen to a steamer while it was in transit.

Q. And did you not say that you realized that when you made this contract?

A. I do not remember stating that.

Q. You do not remember that? A. No.

Q. Try and think about that, Mr. Davis. Try and tell the Court what you said on that point.

(Testimony of L. C. Davis.)

A. I couldn't remember.

Q. Didn't you say that the time of the arrival of that steamer, or of the loading date, or of the sailing date, was not an essential part of this contract?

A. I don't remember making that statement.

Q. Mr. Davis, you know the difference between a loading date and a sailing date, do you not?

A. Why, yes.

Q. Those are two different things, are they not?

A. As much as I know about the steamship business, I would say they were.

Mr. HENGSTLER.—That is all [280]

Redirect Examination.

Mr. McCUTCHEN.—Q. Was it before or after your visit to Mr. Hengstler's office that you refreshed your recollection by the examination of this correspondence? A. It was before.

Q. Had you read the correspondence before you went to Mr. Hengstler's office?

A. I had read some of it.

Q. Did you read all of the correspondence after you went to Mr. Hengstler's office? A. No.

Q. Did you go over any part of the correspondence after being at Mr. Hengstler's office?

A. Yes.

Q. Had your attention been called particularly to these letters and telegrams mentioning these dates before you went to Mr. Hengstler's office?

A. Yes.

(Testimony of L. C. Davis.)

Recross-examination.

Mr. HENGSTLER.—Q. Only one question I would like to ask Mr. Davis that I forgot: Mr. Davis, what was the practice of your office—how long were you in the office of the Ford Motor Co. of Canada?

A. I was never in the office of the Ford Motor Company of Canada.

Q. Ford Motor Co. of San Francisco; I beg your pardon. A. Two years.

Q. Two years? A. Yes.

Q. Do you know what the custom or practice of your office was with reference to destroying letters and documents that had accumulated in your office? Did you become acquainted with that during your connection with the office?

A. The correspondence was so tremendous that it would be impossible to retain any correspondence that had served its purpose any length of time, as I recall it.

Q. And some of the correspondence in this case was destroyed in [281] your office, was it not?

Mr. McCUTCHEN.—One moment. If he knows.

Mr. HENGSTLER.—Q. Tell us whether some of the correspondence was destroyed in your office, within your knowledge?

A. I have no recollection or knowledge.

Q. You did not give any orders to destroy any of it, did you, yourself? A. No.

Mr. HENGSTLER.—That is all.

Mr. WILLIAMSON.—Do you want any more

(Testimony of L. C. Davis.)

correspondence besides what you have got?

Mr. McCUTCHEN.—You undoubtedly have the beginning of that correspondence. It begins with the 25th of February, the day on which the contract was signed. It is hardly conceivable that there could have been correspondence before that date.

Mr. HENGSTLER.—I can easily see that there might have been correspondence before February.

The COURT.—Anything further with this witness?

Mr. McCUTCHEN.—Nothing further.

Mr. WILLIAMSON.—As soon as we could proceed at all, even after you had withdrawn your notice to produce certain correspondence, I telephoned to the manager and asked him to send it down, and within five or ten minutes he said it was all destroyed. I think if there is any question about it we had better bring Mr. Bullwinkel in here and let him testify as to it; if you are not satisfied with the statement I would rather that we brought him in.

Mr. McCUTCHEN.—Here is a file that undoubtedly was prepared for counsel in this case a long time ago, and counsel for the libelant has had the benefit of the examination of that file, and I do not think that that statement ought to be made. [282]

The COURT.—Let us assume that there is a general denial put in and proceed with the taking

(Testimony of W. E. Heppell.)

of the testimony. Let us cover anything that is suggested by counsel that his denial goes to. Call the next witness.

**Testimony of W. E. Heppell, for Respondent.**

W. E. HEPPELL, called for the respondent, sworn.

Mr. GRIFFITHS.—Q. Will you state your business, please, Captain?

A. I am surveyor to Johnson & Higgins.

Q. Are you a master mariner? A. Yes.

Q. What papers do you hold?

A. I hold American and British masters' license, all oceans.

Q. How long were you a master?

A. Twelve years.

Q. In what waters have you sailed as master?

A. Mostly Oriental waters.

Q. What did you say you were doing at present?

A. I am surveyor for Johnson & Higgins.

Q. How long have you been surveying in that capacity? A. Since the 1st of October, 1920.

Q. What were you doing immediately prior to that, Captain?

A. With the Pacific Mail Steamship Co.

Q. Here in San Francisco? A. Yes.

The COURT.—Q. As surveyor?

A. No, sir, I was preparing to go to the Orient as an agent.

Mr. GRIFFITHS.—Q. Just what were you doing with the Pacific Mail Steamship Company while

(Testimony of W. E. Heppell.)

in that preparation, in what duties were you engaged?

A. I had no particular duties, I was going through the whole organization of the Pacific Mail here, to familiarize myself with the conditions, preparatory to taking up an agency in the Orient. [283]

Q. Did you have occasion to be on their docks?

A. Yes.

Q. And to observe their incoming vessels?

A. I was on the docks almost every day.

Q. Do you know the steamship "Cacicue," that we have been talking about in this trial?

A. Yes.

Q. Have you seen her?

A. I saw her in the Orient, at Shanghai.

Q. Have you had occasion to examine the blue-print of the "Cacicue," which Doctor Hengstler handed me during the course of the trial, so as to fully familiarize yourself with her? A. Yes.

Q. Of course, in your experience as master and officer of vessels, you had occasion to discharge cargoes? A. Yes.

Q. Can you give us an estimate, based on your experience as master, and as a surveyor here, and on your experience with the Pacific Mail, and upon your familiarity and your knowledge of the "Cacicue," and of this blue-print, as to how long it would probably take, under the best of conditions—I mean in the absence of strikes, etc.—to discharge an inward cargo from the "Cacicue,"

(Testimony of W. E. Heppell.)

an inward mixed cargo of Chinese goods of 7900 tons?

A. You mean a cargo similar to the stowage plan you showed me?

Q. I mean the exact cargo shown on the inward stowage plan of the "Cacicue," which is attached to the libelant's answers to the interrogatories, and which you have been over?

A. Is that measurement tons?

Q. Both measurement and dead weight, they are.

A. Well, under the very best conditions, working continuously in a ship like the "Cacicue," I should say about 72 hours' continuous working.

Q. By "continuous working," do you mean day and night? A. Day and night, and meal hours.

Q. The full 24 hours?

A. Yes, having relieving gangs at meal [284] hours.

Q. Do you know anything of strike conditions in San Francisco?

A. Yes, I was through the last strike.

Q. When you were in the service of the Pacific Mail, do you mean? A. Yes, sir.

Q. Can you give us an estimate of how much that time would probably be prolonged by a strike affecting the company which was discharging the vessel?

A. When the regular longshoremen went out it was necessary to bring in a crowd or a crew of inexperienced men, and although they had done laboring work of some kind or other, they had not

(Testimony of W. E. Heppell.)

actually handled the merchandise coming into this port, nor were they familiar with the stowage of freight, either stacking it on the dock or in the ship, and I do not believe they would get more than 30 per cent efficiency from a green crew, to begin with; of course, they would improve as they went on.

Mr. HENGSTLER.—Q. May I ask whether the captain's answer was with reference to this strike that existed in June, 1916?

A. No, sir. We have had strikes since then.

Mr. GRIFFITHS.—It was not particularly with reference to that very strike, but he has seen strike conditions in San Francisco.

Mr. HENGSTLER.—Q. You are speaking in a general way about strikes, aren't you?

A. Yes, in a general way.

Mr. GRIFFITHS.—Q. I want you to state it conservatively, Captain. You gave an estimate of 72 hours under the best conditions. What do you think would be the time under strike conditions, putting it within a safe margin?

A. I don't think you could possibly discharge her under eight days' continuous work.

Q. Captain, would you as master take the "Cacicue" on a voyage from [285] San Francisco to Australia if she was leaking in the forepeak, having cracks 20 inches long—vertical cracks—in the sixth strake below the sheer strake, at the stem?

A. No, sir, I don't think I would. First of all, I don't think I would be allowed to take her, I

(Testimony of W. E. Heppell.)

think that the classification societies would not allow her to leave.

Q. Would you take her if she were classed in Lloyd's, without first having the consent of Lloyd's surveyor?

A. No, sir; I would not; and, besides that, a vessel arriving at the port of San Francisco with a leak in the forepeak, the matter would have to be reported to the local inspectors of hulls and boilers, and they would have some say.

Q. If you ascertained, with respect to the bushing of the vessel, that some of the blocks were missing, and some hammered, and some out of place, would you consider her seaworthy to go out, without having that condition rectified?

A. No, sir, I would not.

Q. And referring, now, to No. 2 double bottom tank, if the riveting and the caulking were loose on the gusset plates where they join the tank tops, would you consider her seaworthy to go out unless that condition were repaired, if she were to carry oil or water in those tanks?

A. I have read the surveyor's report on that, which was made in Hongkong—

Q. You mean this particular report?

A. Yes, this particular report on the "Cacique," and he distinctly states that the repairs are to be made at a later date. He naturally referred to her first port. The fact of a ship not being allowed to carry either water ballast or fuel oil in her double bottom tank would indicate that there was some-

(Testimony of W. E. Heppell.)

thing wrong, that the ship was not absolutely seaworthy. [286]

Q. Do you happen to know Mr. Lambert, Lloyd's surveyor at Hongkong, who made this report?

A. Yes, I know him.

Cross-examination.

Mr. HENGSTLER.—Q. Captain, did you read that report of the Hongkong surveyor?

A. Yes.

Q. Did you notice that the surveyor there recognized that the defects in the vessel should be repaired later? A. At a later date, yes.

Q. That is what he recommended? A. Yes.

Q. Would you not say that that indicated that the defects were not so great but that they could have been repaired after the vessel came back to the Orient, after having arrived in San Francisco?

A. The vessel was sailing under a seaworthy certificate, and the fact of the vessel sailing under a seaworthy certificate—a temporary seaworthy certificate from Hongkong, was enough to have the repairs done as soon as possible.

Q. As soon as possible?

A. As soon as possible.

Q. But if the Hongkong surveyor had considered it necessary that she should be repaired in San Francisco, would he not have said so in his certificate? A. Not necessarily.

Redirect Examination.

Mr. GRIFFITHS.—Q. That question of a postponement of repairs refers, does it not, only to the

(Testimony of W. E. Heppell.)

one item of the gusset plates on the No. 2 deep tanks, as to which she was allowed to come to San Francisco under the temporary certificate provided that no water or oil be carried in those tanks?

A. Yes.

Q. The other small items were taken care of at Hong Kong, were they not, according to that report? A. Yes.

Q. And the other items you referred to, the bushing and the leaks [287] in the forepeak, are defects that occurred on the voyage to San Francisco?

A. On the voyage from Hongkong to San Francisco.

Q. That is according to the report you have seen?

A. Yes. These repairs are more or less governed by the classification society surveyor, coupled with the local inspectors of the port; that is, if the owners of the vessel wish to keep her in classification; of course, if they wish to withdraw her from classification, they can ignore the repairs altogether, as long as the ship is seaworthy.

Mr. HENGSTLER.—Mr. McCutchen, I think it appears in the evidence, but I am not certain about it, it is the fact, is it not, that some of the defects and damages were not discovered until after the vessel was in drydock?

Mr. McCUTCHEN.—Yes, I think probably that is so; for instance, these cracks in the plates. I suppose those plates were under water at the time the vessel was loaded. But the leak must have been

(Testimony of J. G. Ludlow.)

known. As Captain Blackett said, someone reported to him there was a leak.

Mr. GRIFFITHS.—I think that is all perfectly clear, Mr. Hengstler. The leak in the gusset plates in the No. 2 double bottom tank was brought to Mr. Blackett's attention by the survey report which came to him from Hongkong, and which he refers to in his own report. And he sent the vessel to drydock because she was leaking in the forepeak, and after she got in drydock he found these other matters.

**Testimony of J. G. Ludlow, for Respondent.**

J. G. LUDLOW, called for the respondent, sworn.

Mr. GRIFFITHS.—Q. Will you kindly state your business, [288] Captain?

A. Master mariner, marine surveyor.

Q. How long were you going to sea?

A. Since 1899.

Q. And you hold master's papers, do you?

A. I do.

Q. Were you ever in the trans-Pacific service?

A. Yes.

Q. With what concern? A. Pacific Mail.

Q. In what capacity?

A. As everything from quartermaster to chief officer.

Q. For how long?

A. For about six and one-half years.

Q. Did the duties of chief officer have to do par-

(Testimony of J. G. Ludlow.)

ticularly with the discharging and loading of cargo?

A. Yes.

Q. What is your present business or connection, Captain?

A. Marine surveyor, associated with Pillsbury & Curtis, of this city.

Q. Immediately prior to that, what was your business?

A. Port captain of the Pacific Steamship Company.

Q. In San Francisco?

A. In San Francisco, and prior to that in Seattle.

Q. What are the duties of a port captain in a general way?

A. General port superintendence duties.

Q. As port captain, did you have occasion to observe the incoming of vessels of the company and the discharge of the cargoes? A. Yes.

Q. Were you port captain of the Pacific Steamship Company during the stevedores' strike in San Francisco in the summer of 1916?

A. I was port captain of the Pacific Steamship Company, with headquarters at Seattle at that time, and I was called to San Francisco to supervise that particular strike.

Q. You were called here on account of the strike?

A. On account of the strike.

Q. Do you know the "Cacique"?

A. I have seen the "Cacique." [289]

Q. Have you examined the blue-print of her which Doctor Hengstler has handed us here?

(Testimony of J. G. Ludlow.)

A. I have.

Q. Can you give us, based on your experience, an estimate as to how long it would take under normal conditions, and if you were endeavoring to discharge as fast as you possibly could, to unload from the "Cacique" a cargo of 7,900 tons, miscellaneous cargo from the Orient?

A. Basing my opinion on the capacity of the hatch of the greatest capacity on that vessel, I would say that it would take between 70 and 80 hours continuous working.

Q. You make some reference to a larger hatch; is one of the hatches unusually large on the "Cacique"?

A. It appears so by that blue-print of the vessel.

Q. And I take it you judge of the speed with which you could unload the entire vessel by the rate at which the largest hatch would be discharged; is that what you mean?

A. The speed of a fleet of vessels is the speed of the slowest vessel in that fleet, and, similarly, the speed of discharging a vessel's cargo, the best speed, is the best speed that you can discharge the largest hatch of that vessel.

Q. What would have been, in your judgment, stating it conservatively and on the safe side, the effect of a strike as to the prolongation of that 73 hours—or 70 to 80 hours, as you state?

A. It would all depend upon the length of time the green men had had opportunity to learn their new business. I understand that this "Cacique"

(Testimony of J. G. Ludlow.)

was in during the latter part of June, and that the strike commenced about the 1st of June, therefore, the men would have had about a month, and they would have, in my opinion, gained about 40 per cent of normal efficiency at that time; it would, therefore, take, I should judge, about 180 consecutive hours to work the 2,940 tons which the blue-print [290] shows is the capacity of the No. 2 hatch.

Q. How long, then, would you say it would have taken to discharge the entire cargo, 7,900 tons, under strike conditions?

A. It would take the length of time that it would take to discharge the longest hatch working consecutively.

Q. Night and day? A. Night and day.

Q. Would you consider it prudent to take the "Cacique" to sea on a voyage from San Francisco to Australia with two cracks in her sheer plating near the stem, in the sixth strake below the sheer strake, bearing in mind she was to be fully loaded so that she would be deep in the water?

A. I would not, no.

Q. Would you take her to sea, as master of the vessel, without the approval of Lloyd's surveyor to the registry, if she were entered in Lloyd's?

A. As master of the vessel I would take her to sea if my owners instructed me to do so—under protest, possibly. I would consider that the vessel was not entitled to full confidence, that she was not in seaworthy condition at that time.

Q. Referring now to her bushings for the tail

(Testimony of J. G. Ludlow.)

shaft, several of the blocks were hammered, and others loose, and the guard ring broken; would you consider it prudent to take her to sea without having those conditions repaired?

A. No, I would not.

Q. And suppose the riveting and caulking on the gusset plates of the No. 2 bottom tank to be loose, would you consider it prudent to take her to sea if you were to have oil or water in those tanks, and cargo in the vessel? A. No, I would not.

Cross-examination.

Mr. HENGSTLER.—Q. Captain Ludlow, assuming that the "Cacique" went out of this port with a cargo of 6,000 tons, being capable of carrying a cargo of 9,000 tons, so that she was only two-thirds [291] in the water, would that qualify your answer with reference to ability to take her on her voyage safely and repair her at the end of the voyage?

A. That is a matter that should be left with the classification society surveyor. My personal opinion is that if a ship is in a port where there is a drydock and those defects are known to exist in the hull also, she ought to be repaired.

Q. I am asking you, however, with reference to a safe voyage; could the voyage be made safely under those conditions if she is only two-thirds loaded, if she carries measurement cargo that is of comparatively little weight?

A. That is very doubtful, whether she could make

(Testimony of J. G. Ludlow.)

the voyage safely under all conditions that might exist during the voyage.

Q. Your answers, however, were predicated, were they not, upon the assumption that she would be deeply laden, that she would carry her full cargo capacity? A. No.

Mr. GRIFFITHS.—Doctor Hengstler, let me direct your attention to interrogatory 50: "How much and what cargo loaded on said steamer 'Cacique' for said outward voyage was contracted for by libelant prior to June 26, 1916?

A. 6,200 tons of respondent's autos, 2358.5 tons for outsiders, which would make a total aggregate of 8500 odd."

Mr. HENGSTLER.—But that is measurement; I am speaking of dead weight.

The COURT.—Personally, I think we are shooting at the moon. Mr. Carter testified he would not have sent the ship out without the consent of Lloyd's; Lloyd's representative said she could not go out until these repairs were made. There you are.

Mr. HENGSTLER.—That is all, Captain. [292]

Mr. McCUTCHEN.—Simply for the purpose of completing the correspondence between the libelant and the respondent, and the correspondence between the libelant and the Ford Motor Co. at San Francisco with reference to one phase of this matter, we desire to offer two letters, and, following the practice which has been pursued by the other side, I will read them so that the reporter may extend them

"San Francisco, June 22, 1916.

"Ford Motor Co. of Canada,

"Ford, Ontario.

"Gentlemen:

"Supplementary to our previous advices, we enclose herewith carbon copy of our letter of today's date to Ford Motor Co., San Francisco.

"Yours very truly,

"W. R. GRACE & CO.

"H. E. MOORE,

"Traffic Manager."

And the letter which was enclosed in that letter is dated the same date:

"San Francisco, June 22, 1916.

"Ford Motor Co.,

"21st and Harrison Streets,

"San Francisco, Calif.

"Gentlemen:

"Supplementary to our letter June 6th, advising that steamship 'Cacique' will be ready to load at San Francisco June 27, please note the delivery of 6,200 tons automobiles and parts full quantity of your engagement under contract dated February 25 must commence on that date, June 27, and be completed not later than June 29. Yours very truly,

"W. R. GRACE & CO.,

"H. E. M.,

'Traffic Manager." [293]

There was a letter introduced bearing date June 6, 1916, addressed, I think, to the Ford Motor Co. of Canada, but as to that I am not very clear at this moment, but at any rate on the same date there

was a letter addressed to the Ford Motor Co., San Francisco, by Grace & Co., reading as follows:

"June 6, 1916.

"Ford Motor Co.,

"21st and Harrison Streets,

"San Francisco, Calif.

"Gentlemen:

"We beg to confirm our previous oral advices to you that steamship 'Cacique' will be ready for loading the 6,200 tons of automobiles and parts and packages as per our contract of February 25, 1916, on or about the 27th day of June, 1916. We now understand that shipment is en route to San Francisco, and that you have made all arrangements with the railroads to have same alongside our ship on the 27th instant, ready for loading as fast as ship can receive, which is also in accordance with our contract of February 25.

"Yours very truly,

"W. R. GRACE & CO.

"Traffic Department."

It is my recollection, Doctor Hengstler, that on the original, above the words "Traffic Department," was signed in ink "D. Mann," who is a member of your traffice department.

Mr. HENGSTLER.—Yes, I think that is correct. It was signed by someone in the traffic department.

Mr. GRIFFITHS.—It was signed by Dalton Mann.

Mr. HENGSTLER.—Yes, Dalton Mann.

Mr. McCUTCHEN.—That is our case, your Honor. [294]

**Testimony of George Florintine, for Libelant (In Rebuttal).**

GEORGE FLORINTINE, called for the libelant in rebuttal, sworn.

Mr. HENGSTLER.—Q. What is your business, Mr. Florintine? A. Steamship.

Q. What firm are you connected with?

A. W. R. Grace & Co.

Q. Do you recall meeting me in my office about a week ago, at a meeting at which there were present Mr. Harvey E. Moore and Mr. L. C. Davis?

A. Yes.

Q. Do you remember that at that time I asked Mr. Davis to refresh his memory, and I asked him in reference to different facts in connection with the "Cacique" shipment of 6,200 tons automobiles which were to go to New Zealand and Australia; you remember that, do you not?

A. Very distinctly; yes.

Q. Will you kindly tell the Court what Mr. Davis stated in connection with that transaction, and in connection with the facts, particularly in connection with the contract that was entered into between himself and Mr. Moore relative to the time of the loading of this vessel with the 6,200 tons automobiles?

A. I remember the conversation very distinctly. Mr. Hengstler said to Mr. Davis: "Do you remember the circumstances that first brought you up to Grace & Co. in connection with this shipment?" And Mr. Davis said that he had been out of the Ford Company for so long that his recollection was

(Testimony of George Florintine.)

not clear at all, that when he left the Ford Company he immediately proceeded to forget all that he had to do with the Ford Company. And Mr. Hengstler said that he would allow him to look over the correspondence to refresh his memory. And after reading through the correspondence, and going over it, Mr. Davis' recollection was a little clearer. He said: "Yes, some of those things come back to me now, I remember coming up to Grace & Company's office [295] with Mr. Meyers and discussing the matter with him; Mr. Moore then took us in to Mr. Carter, and Mr. Carter seemed anxious for the business but did not know where he could get a ship, so he said, 'Come in in a few days later.'' And Mr. Davis said that he went back a few days later and went to Mr. Moore's office—

Mr. McCUTCHEN.—If your Honor please, Mr. Davis was not asked anything about this conversation that this witness is narrating now.

Mr. HENGSTLER.—Yes, he was.

Mr. McCUTCHEN.—No, nothing of the kind was called to Mr. Davis' attention.

Mr. HENGSTLER.—I asked Mr. Davis with reference to any agreement that was made between the parties as to the time of loading this vessel, and you, yourself, asked him that, too.

Mr. McCUTCHEN.—You are impeaching Mr. Davis now, as I take it. I think the question asked of him was—at any rate, this is my recollection, "Was there anything said about a particular day

(Testimony of George Florintine.)

on which that vessel would arrive in San Francisco?"

Mr. HENGSTLER.—Q. What did Mr. Davis say with reference to the particular days when the vessel would arrive in San Francisco, or load—well, would arrive in San Francisco?

A. I will have to tell it in my own way.

Mr. McCUTCHEN.—I object to the witness telling it in his own way. This inquiry should be confined to the questions which were asked of Mr. Davis, and which Mr. Davis answered.

A. Well, the question came up about this loading: Mr. Davis was sitting by the window, and he said: "Well, I quite agree with you, there is no steamship man that would—it would be almost [296] impossible for any steamship man to say four months ahead the exact date that a vessel would arrive at any particular port," because he appreciated that there would be a great many conditions which might arise which would prevent a vessel making a port on any certain date, particularly as it had to make these two voyages—at least the voyage to San Francisco and then return before it could meet the date. He said that as he remembered it he was very glad to get the space and that—

Mr. McCUTCHEN.—I object to that. Mr. Davis' attention was not called to that.

A. (Continuing.) Well, I was there, and I know what he said.

Mr. McCUTCHEN.—That is not part of the question.

(Testimony of George Florintine.)

Mr. HENGSTLER.—Q. Go ahead.

Mr. McCUTCHEN.—Does your Honor rule that he may proceed?

The COURT.—The question that was asked Mr. Davis, and to which he returned a rather hesitating reply, had to do with a date. I do not recall the exact form of the question. The exact form of the question that was put to Mr. Davis ought to be put to this witness. Mr. Davis was asked, "Did he not in your office say certain things."

Mr. HENGSTLER.—Mr. Reporter, will you read to this witness the question and answer on that subject of the date of the arrival of that vessel, the question put to Mr. Davis and the answer given by him.

(The record was here read by the reporter as follows:)

"Q. Don't you remember that you said that no steamshipman could possibly foretell four months ahead the time of arrival of a steamer at any particular time, and that for that reason it was not intended to make any contract for any arrival on any particular date? A. I don't remember of making such a broad [297] statement as that, about being a steamship man."

Q. Now, what did Mr. Davis say?

A. As I remember it, he said exactly what was read to me there, that he did not think that any steamshipman would be in a position to definitely fix a date for the arrival of any vessel four months

(Testimony of George Florintine.)

ahead, particularly in view of the voyage the vessel had to make.

The COURT.—Q. And that is all?

A. That is all at that particular moment, yes, sir.

Mr. HENGSTLER.—That is all.

Mr. McCUTCHEN.—No cross-examination.

Mr. HENGSTLER.—That is our case.

The COURT.—Do you want to argue the case?

Mr. HENGSTLER.—Do you want to argue the case orally?

Mr. McCUTCHEN.—We are ready to proceed.

Mr. HENGSTLER.—If your Honor please, I would rather present the argument in briefs. There is so much correspondence in the record now, of which I have but a very superficial examination, that it would be impossible to do it full justice at a first reading. If the other side has no objection, I think the case could only be treated properly by briefing it. But if it is to be argued orally, I would like to have a later date set for the argument.

Mr. McCUTCHEN.—I don't object to that, your Honor, I don't want to crowd counsel into an argument if he is not ready for it, but I do think that this case is one that ought to be argued orally.

The COURT.—Do you mean as to the facts?

Mr. McCUTCHEN.—On the facts, your Honor, yes. [298]

The COURT.—I don't think there is any question as to the facts.

Mr. McCUTCHEN.—Very well, then, as to the law we are ready to present our argument now.

Mr. HENGSTLER.—I can present the law only by referring to some facts with which I became acquainted only to-day.

Mr. McCUTCHEN.—This question was quite thoroughly briefed in many of the phases that are now before the Court on a proceeding that arose, I think, on counsel's motion to strike out portions of the answer.

Mr. HENGSTLER.—That only raised a very small portion of the questions involved in this case. There are other questions involved in the case.

Mr. McCUTCHEN.—There are three principal questions involved in the case, as I understand it: First, did those letters of the 14th and 24th of June amount to a renunciation of the contract; second, and probably more important than any other question, was that renunciation accepted; that divides itself into possibly two or three questions; and the third question is whether or not that ship was ready to go to sea in the month of June, if she was obligated to go during the month of June, or was she ready to take on cargo during the month of June, this cargo spoken of in the contract.

Mr. HENGSTLER.—I will be ready, if your Honor will set the case tomorrow, or at any other date. I will admit that I am not in good condition to argue it at the present time.

The COURT.—I might hear you Friday, if I get through with the case that I have for trial to-

morrow, in view of the fact that the other case has gone over that was to follow it. But that will be contingent upon finishing the case I have set for [299] trial to-morrow.

Mr. McCUTCHEN.—How would this suggestion do: Are you willing to be limited, Doctor, to an hour on each side for the oral argument?

Mr. HENGSTLER.—Will your Honor accept a memorandum of authorities, besides hearing oral argument?

The COURT.—Yes, I want as much light, perhaps, as anybody, and need it more.

Mr. HENGSTLER.—In that case, I will agree to an hour on each side.

Mr. McCUTCHEN.—Or, perhaps you would rather do this: You suggested setting it down for Friday afternoon. Suppose we meet at two o'clock, and if his Honor will sit until half-past four on Friday, each side can have an hour and a quarter. I think that ought to be quite ample time.

Mr. HENGSTLER.—Yes, that will be satisfactory.

The COURT.—All right, we will do that.

(Thereupon the cause was continued until Friday, November 19, 1920, at two o'clock P. M., for argument.)

[Endorsed]: Filed Nov. 27, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [300]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

Before Hon. MAURICE T. DOOLING, Judge.

VOLUME 4.

W. R. GRACE & CO., INC.,

Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation,

Respondent.

Monday, November 22, 1920.

COUNSEL APPEARING:

For Libelant: L. T. HENGSTLER, Esq.

For Respondent: E. J. McCUTCHEN, Esq., W. F. WILLIAMSON, Esq., and F. P. GRIFFITHS, Esq.

Mr. McCUTCHEN.—If your Honor please, before the argument proceeds, since the adjournment of this case, or, rather, after the adjournment of the case Mr. Williamson found among his files, and in the files of a matter of which he had charge for the Ford Company, other than this Grace controversy, a telegram to which the telegram of Davis of the 24th is an answer. We would like to introduce that telegram in order to make the file com-

plete. Mr. Williamson sent Dr. Hengstler a copy of it.

Mr. HENGSTLER.—He handed me a copy of it.

Mr. McCUTCHEN.—Have you any objection, Doctor? [301]

Mr. HENGSTLER.—I don't care to have anything to say about that, at all. You can do whatever you please in reference to that.

Mr. McCUTCHEN.—Very well. We offer it in evidence. It is as follows:

"Walkerville, Ontario, February 23.

"Ford Motor Company,

"2905 21st Street,

"San Francisco, California.

"Have arranged with Illinois Central representing Hind Rolph for Union Steamship for four thousand tons and with Southern Pacific it is likely for twenty-two hundred tons April and May; would like another four thousand tons May and June sailing; offer $47.50.

"FORD SALES DEPARTMENT."

Now, if your Honor please, I do not know to what extent the files of this court are deemed to be evidence for the purpose of a trial, if at all, but in order that there may be no question of that kind, there is part of the record in this case which we desire to offer in evidence.

The COURT.—You mean part of this record?

Mr. McCUTCHEN.—Yes, your Honor, part of the record in this case. Mr. Griffiths will enumerate them.

Mr. GRIFFITHS.—They are simply the documents connected with the issuance of process, that is to say, the praecipe, the monition, the citation, the marshal's return.

The COURT.—All right.

Mr. GRIFFITHS.—I will enumerate them and the reporter may copy them into the record, so that these papers may be returned to the clerk.

The praecipe to the clerk of the court, filed June 27, 1916; [302] the monition *in rem,* together with the marshal's return thereon, and together also with the affidavit of publication annexed thereto. Those constitute one document.

The citation against the respondent, the Ford Motor Company of Canada, Limited, a corporation, and the marshal's return on that; the citation and the order for foreign attachment; the marshal's return annexed thereto, and the return of the garnishee, Southern Pacific Company, also attached thereto. Those constitute one document.

And I suppose it will be stipulated, Doctor Hengstler, that the proclamation was read in the regular and due course.

Mr. HENGSTLER.—Anything that is in the record of the case, or the minutes, I suppose, will be all right.

Mr. GRIFFITHS.—That is all.

(The documents enumerated by Mr. Griffiths read as follows:)

"UNITED STATES OF AMERICA.

"District Court of the United States, Northern District of California.

"CLERK'S OFFICE.

"No. 16,058.

"W. R. GRACE & CO., a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation and CERTAIN AUTOMOBILES, etc.,
Respondents.

PRAECIPE.

"To the Clerk of Said Court:

"Sir: Please issue Monition and Citation in the above *rem* and *personam* proceeding.

"ANDROS & HENGSTLER,
"GOLDEN BELL,
"Proctors for Libelant. [303]

(Endorsed: "No. 16,058. U. S. District Court Northern District of California. W. R. Grace & Co., Libelant, vs. Ford Motor Company, etc. et al., Respondents. Praecipe for Citation and Monition. Filed Jun. 27, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.")

"Northern District of California,—ss.

"The President of the United States of America, to the Marshal of the United States for the Northern District of California—GREETING:

[Seal]

"Whereas a Libel hath been filed in the District Court of the United States for the Northern District of California, First Division, on the 27th day of June in the year of our Lord, one thousand nine hundred and sixteen. By W. R. Grace & Company, a corporation, against The Certain Automobiles and Parts in Packages, and 1,100 Packages on Pier 26, San Francosco, Cal., in a cause of action for damages, $319,500.00, civil and maritime, for the reasons and causes in the said Libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said certain automobiles and parts in packages & 1,100 Packages on Pier 26 may be cited in general and special to answer the premises, and all proceedings being had that the said certain automobiles and parts in packages may for the causes in said Libel mentioned, and 1,100 Packages on Pier 26 be condemned and sold to pay the demands of the Libelant,

"You are therefore hereby COMMANDED to attach the said Certain Automobiles and Parts in Packages, and 1,100 Packages on Pier 26, and to retain the same in your custody until the further [304] order of the Court respecting the same and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear before the said Court, to be held in and for the Northern District of California, on the 11th day of July, A. D. 1916, at 10 o'clock in the forenoon of

the same day, if that day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations on that behalf.

"And what you shall have done in the premises you then and there make return thereof, together with this writ.

"Witness the Hon. M. T. DOOLING, Judge of said Court, at the City and County of San Francisco, in the Northern District of California, this 27th day of June, in the year of our Lord, one thousand nine hundred and sixteen.

"W. B. MALING,
"Clerk,
"By C. W. Calbreath,
"Deputy Clerk.

"ANDROS & HENGSTLER,
"Proctor for Libelant.

"MARSHAL'S RETURN.

"In obedience to the within Monition, I attach "the property herein described, on the 27th day of June, 1916, and have given due notice to all persons claiming the same that this Court will, on the 11th day of June, 1916, (if that day be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to trial and condemnation thereof, should no claim be interposed for the same. I further return that I posted a notice of seizure on

the herein named Property and placed a keeper in charge thereof.

"J. B. HOLOHAN,
"United States Marshal. [305]
"By Lawrence J. Conlan,
"Office Deputy.

"San Francisco, Cal., July 11, 1916.

(Endorsed: "Marshal's Docket No. 7795. No. 16,058. District Court of the U. S., Northern District of California, First Division. W. R. Grace & Co. vs. Certain Automobiles and Parts in Packages. Monition ret'ble July 11th, 1916. ———, Proctor for Libelant. Issued ———, 191—. Filed Jul. 11, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.")

"In the District Court of the United States for the Northern District of California.

"IN ADMIRALTY—No. 16,058.

"W. R. GRACE & COMPANY, a Corporation,

vs.

CERTAIN AUTOMOBILES AND PARTS IN PACKAGES, 1100 Packages on Pier 26, San Francisco, California, Consigned to Order of FORD MOTOR COMPANY OF CANADA, LIMITED.

"AFFIDAVIT OF PUBLICATION.

"State of California,
City and County of San Francisco,—ss.
"E. C. Luchessa, being first duly sworn, deposes

"That he is and at all times hereinafter mentioned was a citizen of the United States, over the age of twenty-one years, and a resident of said City and County; and is and was at and during all said times the principal clerk of The Recorder Printing and Publishing Company, printers and publishers of 'The Recorder,' a newspaper of general circulation printed and published daily (Sundays and legal holidays excepted) in the City and County of San Francisco, State of California; [306] that said 'The Recorder' is and was at all times herein mentioned, a newspaper of general circulation, as that term is defined by Section 4460 of the Political Code; its status as such newspaper of general circulation having been established, pursuant to Section 4462, Political Code, by a decree of the Superior Court of the City and County of San Francisco, Department No. 11 thereof, Hon. William P. Lawlor, Judge, made and entered on the 11th day of October, 1905, which said decree was restored by a judgment given in the Superior Court of the City and County of San Francisco, Department No. 11 thereof, Hon. William P. Lawlor, judge, made and entered on the 2d day of December, 1907, and recorded in Record Book 15, at page 155 thereof; and as provided by said Section 4460, is and at all said times was published for the dissemination of local and telegraphic news and intelligence of a general character, having a *bona fide* subscription list of paying subscribers, and is not and never was devoted to the interests, or published for the entertainment or instruction of a particular class, pro-

fession, trade, calling, race or denomination, or for the entertainment and instruction of any number of such classes, professions, trades, callings, races or denominations; that at all said times said newspaper had been established, printed and published in said City and County of San Francisco, State of California, at regular intervals for more than one year preceding the first publication of this notice herein mentioned; that said notice was set in type not smaller than nonpareil and was preceded with words printed in black face type not smaller than nonpareil, describing and expressing in general terms the purport and character of the notice intended to be given; that a Monition is the above-entitled matter, of which [307] the annexed is a true printed copy, was published in said newspaper on the following dates, to wit: June 29 and 30, 1916, and July 1, 3, 5, 6, 7, 8, 10 and 11, 1916; being as often as said newspaper was published during said period; and further deponent saith not.

"E. C. LUCHESSA.

"Subscribed and sworn to before me this 11th day of July, 1916.

"[Seal] CHARLES R. HOLTON,

"Notary Public in and for the City and County of San Francisco, State of California.

"MONITION.

"In the United States District Court, for the Northern District of California.

"IN ADMIRALTY—No. 16,058.

"W. R. GRACE & COMPANY, a Corporation,

vs.

CERTAIN AUTOMOBILES AND PARTS IN PACKAGES, 1100 PACKAGES ON PIER 26, SAN FRANCISCO, CALIFORNIA, Consigned to Order of FORD MOTOR COMPANY OF CANADA, LIMITED.

"In obedience to a warrant of seizure to me directed, in the above-entitled cause, I have seized and taken into my possession the following described personal property, to wit: Certain automobiles and parts in packages, 1100 packages on Pier 26, San Francisco, California, consigned to the order of Ford Motor Company of Canada, Limited.

"For the causes set forth in the libel now pending in the U. S. District Court for the Northern District of California, at San Francisco, California, I hereby give notice to all persons claiming the said described certain automobiles and parts in packages, 1100 packages on Pier 26 San Francisco, California [308] consigned to order of Ford Motor Company of Canada, Limited, or knowing or having anything to say why the same should not be condemned and forfeited, and the proceds thereof distributed according to the prayer of the libel, that they be and appear before

the said Court, to be held in and for the Northern District of California, at the United States court-room, in the City of San Francisco, on the 11th day of July, 1916, at 10 o'clock on the forenoon of that day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf.

"J. B. HOLOHAN,

"U. S. Marshal, Northern District of California,

"By L. J. Conlon,

Deputy.

"June 29 td."

(Endorsed: "No. 16,058. In the District Court of the United States for the Northern District of California. In Admiralty. W. R. Grace & Company, a Corporation, vs. Certain Automobiles and Parts in Packages, etc. Affidavit of Publication in 'The Recorder' of Monition. J. B. Holohan, U. S. Marshal, San Francisco, Cal.")

"Northern District of California,—ss.

"The President of the United States of America, to The Marshal of the United States for the Northern District of California —GREETING:

[Seal]

"Whereas, a Libel has been filed in the District Court of the United States for the Northern District of California, First Division, on the 27th day of June in the year of our Lord, one thousand nine hundred and sixteen, by W. R. Grace & Company, a corporation, vs. Ford Motor Company. [309] of

Canada, Ltd., a corporation in a certain action for damages, civil and maritime, to recover the sum of $319,500 (as by said libel, reference being hereby made thereto, will more fully and at large appear), therein alleged to be due the said libelant and praying that a citation may issue against the said respondent, pursuant to the rules and practice of this Court; NOW, THEREFORE, we do hereby empower and strictly charge and command you, the said Marshal, that you cite and admonish the said respondent, if it shall be found in your District, that it be and appear before the said District Court, on Tuesday, the 11th day of July, A. D. 1916, at 10 o'clock in the forenoon at the courtroom in the city of San Francisco, then and there to answer the said libel, and to make its allegations in that behalf; and have you then and there this writ, with your return thereon.

"WITNESS, the Honorable M. T. DOOLING, Judge of said court, the 27th day of June in the year of our Lord, one thousand nine hundred and sixteen.

"WALTER B. MALING,
"Clerk.
"By C. W. Calbreath,
"Deputy Clerk.

"ANDROS & HENGSTLER,
"Proctor for Libelant.

"MARSHAL'S RETURN.

"I hereby return that I am unable to find the Respondent Ford Motor Company of Canada

(Ltd.), a Corporation in my District, this 11th day of July, A. D. 1916.

"J. B. HOLOHAN,
"U. S. Marshal.
"By Geo. H. Burnham,
"Chief Deputy Marshal."

(Endorsed: "Marshal's Docket No. 7795. No. 16,058. U. S. District Court, Northern District of California, First Division. W. R. Grace & Co., a Corp., vs. Ford Motor Company of Canada. Filed Jul. 11, 1916. W. B. Maling, Clerk. By C. W. Calbreath, [310] Deputy Clerk.")

"UNITED STATES MARSHAL'S RETURN.

"I certify that after due and diligent search and inquiry, I am unable to find the within named respondent within the Northern District of California, and that in obedience to and under and by virtue of the within Writ, I attached the goods and chattels, which are described as follows and which were found within said Northern District of California, to wit: One Hundred and eighty (180) cars of automobiles shipped by the Ford Motor Company of Canada, Limited, from Walkerville, Ontario, and consigned to the order of Ford Motor Company of Canada, Limited, or to W. R. Grace & Company at San Francisco, which cars moved over the lines of the Southern Pacific Company and connecting carriers to San Francisco, and all of said automobiles and parts contained in said shipment being at San Francisco and in the possession of said Southern Pacific Company with the exception

of thirty (30) cars of automobiles which were delivered to W. R. Grace & Company at Pier 26, San Francisco; all of said automobiles and parts in packages being claimed by the Ford Motor Company of Canada, Limited, a corporation, and released by me upon said respondent furnishing a bond in the sum of four hundred thousand dollars, as appears from the records and files in the office of the clerk of said court.

"J. B. HOLOHAN,
"United States Marshal.
"By Lawrence J. Conlon,
"Office Deputy.

"San Francisco, California, July 11, 1916. [311]

"In the District Court of the United States, for the Northern District of California, First Division.

"IN ADMIRALTY—No. 16,058.

"W. R. GRACE & CO., a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,
Respondents.

"CITATION AND ORDER FOR FOREIGN ATTACHMENT.

"The President of the United States of America, to the Marshal of the Northern District of California, GREETING:

"WHEREAS, a libel was filed in the District

Court of the United States, in and for the Northern District of California, on the 27th day of June, in the year of our Lord one thousand nine hundred sixteen, by W. R. Grace & Co., a Corporation, Libelant, against the above-named respondent, Ford Motor Company of Canada, Ltd., in a certain cause of contract civil and maritime, for recovery of $319,500.00 damages alleged to have resulted to said libelant through the failure of said respondent to perform its duties and obligations under and by virtue of the terms of a certain agreement whereby said respondent agreed to ship certain merchandise from San Francisco to Australia on libelant's steamship 'Cacique,' to the damage of libelant, in said sum of $319,500.00, and praying that a citation may issue against said respondent pursuant to the rules and practice of this court, and that the goods, chattels and credits of respondent in this district may be attached to compel the respondent's attendance in case it cannot be found;

"NOW, THEREFORE, we do hereby directly charge and empower [312] and command you, the said Marshal, that you warn said respondent Ford Motor Company of Canada, Ltd., if it shall be found in your District, to be before said District Court of the United States, at the Postoffice Building in the city and county of San Francisco, State of California, on the 11th day of July, A. D. 1916, at ten (10) o'clock A. M., then and there to answer the said libel and make its allegations in that behalf; and if said respondent cannot be found in your District, we command you that you attach its goods

and chattels in your District to the amount sued for; and if sufficient goods and chattels cannot be found, then that the credits and effects of said respondent in the jurisdiction of this Court may be attached, and that you cite the persons in whose hands or possession such credits and effects may be to appear and answer on oath as to such credits and effects in their hands belonging to said respondent; and have you then and there this writ with your return thereon.

"WITNESS the Honorable MAURICE T. DOOLING, Judge of said court, this 27th day of June, in the year of our Lord one thousand nine hundred sixteen.

"[Seal] W. B. MALING,
Clerk.
"C. W. Calbreath,
"Deputy Clerk U. S. District Court, Northern District of California.
"ANDROS & HENGSTLER,
"GOLDEN W. BELL,
"Proctors for Libelant.

"In the District Court of the United States, for the Northern District of California, First Division.

"IN ADMIRALTY—No. 16,058.

"W. R. GRACE & CO., a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,
Respondents. [313]

"RETURN OF SOUTHERN PACIFIC COMPANY TO CITATION AND ORDER FOR FOREIGN ATTACHMENT AND TO GARNISHMENT.

"Now comes Southern Pacific Company, a corporation, organized and existing under and by virtue of laws of the State of Kentucky, and makes the following return to the citation and order for foreign attachment and to the garnishment heretofore served upon it in the above-entitled proceedings, to wit:

"Said respondent, Ford Motor Company of Canada, Ltd., caused to be shipped from Walkerville, Ontario, 180 cars of automobiles consigned to W. R. Grace & Co., at San Francisco, which said cars moved over the lines of Southern Pacific Company, and connecting carriers, to San Francisco, and all of the automobiles and parts contained in said shipments are now at San Francisco in the pos-

session of said Southern Pacific Company, with the exception of 30 cars of automobiles which were delivered to W. R. Grace & Co., at Pier 26, San Francisco, and are now in the custody of the United States Marshal. A statement showing the number and initials of the cars contained in said shipments, the contents, point of origin, waybill reference, point of destination, the party to whom notice of such shipments was to be given (said shipments moving under order bills of lading), and the steamer via which said shipments were to be transported from San Francisco, was filed with the Marshal on June 28, 1916, and the same is hereby specifically referred to and made a part of this return.

"Said Southern Pacific Company has in its possession no other property belonging to said Ford Motor Company of Canada, Ltd., nor is it indebted to said Ford Motor Company of Canada, Ltd., in any sum or sums whatsoever. [314]

"SOUTHERN PACIFIC COMPANY.

"By T. O. EDWARDS,

"Assistant Secretary.

"C. W. DURBROW,

"FRANK B. AUSTIN,

"Proctors for Southern Pacific Company.

"State of California,

City and County of San Francisco,—ss.

"T. O. Edwards, being duly sworn, deposes and says:

"That he is an officer, to wit: Assistant Secretary of Southern Pacific Company, a corporation, named

in the foregoing return and that he is duly qualified and authorized to make this verification for and on behalf of said corporation; that he has read the foregoing return to the citation and order for foreign attachment and garnishment and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

"T. O. EDWARDS.

"Subscribed and sworn to before me this 6th day of July, 1916.

"[Seal] HUGH T. SIME,

"Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed: "No. 16,058. In the District Court of the United States, Northern District of California, First Division. In Admiralty. W. R. Grace & Co., etc., Libelant, vs. Ford Motor Company of Canada, etc., Respondents. Return of Southern Pacific Co. to Citation and Order for Foreign Attachment. Filed Jul. 11, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. ———, Proctors for S. P. Co., 828 Flood Building, San Francisco, Cal.") [315]

Mr. HENGSTLER.—If your Honor please, I would like to hand you a copy of my argument, and I will hand a copy of it to the other side.

## OPENING ARGUMENT OF L. T. HENGSTLER, ESQ.

Mr. HENGSTLER.—This case revolves upon the construction of a contract, and in particularly a clause of the contract which reads as follows:

> "Shipment per American S. S. 'Cacique' June Loading."

These words are in the first line of the clause. Then there is a semicolon; then follow these words in the next two lines:

> "When vessel is closer at hand, will advise you more definitely as to exact loading date."

I wish to call your Honor's attention to the fact that there is no comma between the words "'Cacique'" and "June loading." A comma crept in, in the briefs on the other side, and inadvertently into the opinion rendered by your Honor on the former occasion when exceptions to the answer were passed upon; I consider that comma of some importance in the interpretation of this clause.

The second part of the clause speaks of the exact loading date, and it provides that this exact loading date will be given to the other side in the future, some time in the future, namely, when the vessel is closer at hand; in other words, as to any exact loading date I cannot tell you at the present time. That is the information given on the 25th of February; I cannot advise you definitely, the contract says, in any other way except in so far as the remainder of the clause designates it as "'Cacique' June loading."

Under our construction of the contract from the language itself, and I will show to your Honor that the actions of the [316] parties carry out and support that construction of the contract and that the correspondence which was introduced in evidence does support that construction of the contract, the question is not as to what "June loading" means, but the question is as to what "'Cacicue' June loading" means.

The contract provides that the shipper will be advised more definitely than it is advised by the words "'Cacicue' June loading" later on, when the vessel is closer at hand. There is no precise date fixed in this contract, therefore, for the loading of the vessel.

Now, what is the meaning of the words "'Cacicue' June loading"? Our contention is that it means "Cacicue's June loading," under all the circumstances as they will appear and have appeared in the evidence in this case. The respondent's contention is that these words "Cacicue June loading," after you detach the words "June loading" from the word "Cacicue" mean a condition precedent, that the "Cacicue" must load in June, and that if she does not load in June, that then the contract is automatically cancelled, as it has been stated in one of the letters.

If such were the intention, it certainly could be very easily expressed by the usual words used in cases where such an intention is intended to be expressed; for instance, the words "Warranted to load in June"; or words like these, "Provided that the

'Cacicue' load the shipment in June"; or, "If the ship is not ready to load in June the shipper shall have an option to cancel."

Now, any of these expressions would have been very simple to add if the intention of the shipper had been that the "Cacicue" loading must be made in June. On the other hand, our contention [317] is that the words mean "Per American S.S. 'Cacicue's' June loading." Your Honor has to choose between these two contentions. With reference to that, I want to call your attention to the general principle of law applicable in a case of that sort. If the words "June loading" are detached and if we had to do here with a contract of sale, it would have been a very much simpler case and the position of the other side would be very much more susceptible than it is admitted, but we do not deal in this case with a contract of sale, but with a contract of affreightment.

In the first volume of Parsons on Maritime Law, page 272, the author says:

> "It may almost be said that there is a presumption of law, for there is certainly a strong disposition of the courts against such a construction of a covenant or promise as would make it a condition precedent."

And in Abbott on Shipping,—I have it here page 368, but I am almost sure there is a mistake about that, and if there is I would like to ask permission to make a correction, and that will apply to any other clerical errors that there might be in my

memorandum, for I had to get it up very hurriedly,—the following is said:

> "An intention to make any particular stipulation a condition precedent should be clearly and unambiguously expressed."

That carries out the same idea which is contained in Parsons, that the disposition of the courts is against such a construction, and that there is practically a presumption of law that where the words are not clear, where it does not say, "Warranted to load in June," or words to the same effect, the Courts will not construe the words as a condition precedent [318] or a warranty.

As the intention is drawn from the language of the contract alone, the first line describes the shipment. It begins with the word "Per." The word "Per" connotes an instrumentality, a method, by what method, by what instrumentality the shipment is to be made. The answer is in the remaining part of this contract: "S.S. 'Cacicue' June loading."

At this point we have to look up from the four corners of the agreement, because the words "'Cacicue' June" cannot be explained by purely grammatical means. What do the words "'Cacicue' June" mean? Your Honor has the testimony on that point as to what the "Cacicue" was at the time, and where she was, and what the parties understood with reference to the "Cacicue."

On the question of interpretation, and for the purpose of overcoming the contention of the respondent that it meant "Warranted to load in

June," I want to recall to your Honor's mind the case of Reed vs. Insurance Co., 95 U. S. 23. In that case an insurance contract provided as follows:

> "Risk to be suspended while vessel is at Baker's Island loading."

The question was, whether the clause means, while the vessel is at Beker's Island for the purpose of loading, or while it is at said island actually loading. The clause on the face of it, was ambiguous. The Court says: "A strictly literal construction would favor the latter meaning"—that is to say, it would favor the meaning "actual loading." If the words "June loading" are to be detached from "Cacicue," it may be that a strictly literal meaning would aid the respondent in this case. [319]

"But a rigid adherence to the letter often leads to erroneous results, and misinterprets the meaning of the parties. That such was not the sense in which the parties in this case used the words in question is manifest, we think, from all the circumstances of the case. Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in

which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the Court, in construing their language, from falling into mistakes and even absurdities."

Taylor says in his work on Evidence, section 1085:

"It may, and indeed it often does, happen, that, in consequence of the surrounding circumstances being proved in evidence, the Courts give to the instrument, thus relatively considered, an interpretation very different from what it would have received, had it been considered in the abstract. But this is only just and proper; since the effect of the evidence is not to vary the language employed, but merely to explain the sense in which the writer understood it."

In that connection, I would like to refer your Honor to a case which was omitted here through inadvertance, the case of Hull Coal Co. vs. Empire Coal Co., 113 Federal, 261, a Circuit [320] Court of Appeals case, in which the Court laid down the rule, in line with the cases cited, that the intention is to be ascertained in connection with the subject matter and the attendant circumstances, the situation of the parties, the purpose of the contract. The Court says:

> "When these are ascertained, they must prevail over the dry words used."

Now, in this case, if your Honor please, even on the very face of the contract it is not necessary to do any violence to the words or to their meaning for the purpose of adopting the view taken by the

libelant as to the meaning of this contract. I think it would be necessary to do violence to the language to read into it the warranty. But the circumstances which were shown here before the Court show that no intention existed on the part of either party to make the June loading a condition precedent.

I refer your Honor, first, to Mr. Moore's testimony. He told Mr. Davis, when Mr. Davis came to him, that it was impossible to figure definitely on any steamer of that sort, a tramp steamer, which is not running on any schedule. The gist of his testimony was that in a favorable voyage to Vladivostok and return she ought to be here to load sometime in June,—and remember those words, your Honor, she ought to be here to load sometime in June.

Again, he says: "Probable June loading was the only thing that was discussed by Mr. Davis."

On cross-examination he says: "The understanding was that the cargo was to be lifted when the 'Cacicue' returned from Vladivostok; we designated that voyage as her June loading in San Francisco to distinguish it from her March-April loading when [321] she left for Vladivostok."

So that the meaning of the parties when they wrote this contract was that this cargo should be lifted per American steamship "Cacicue" when she returned from Vladivostok at the end of her second voyage; that it was the "Cacicue" June loading to distinguish it from the "Cacicue's" March-April loading, which was the intention of the parties.

Mr. Carter, in his testimony, says that Mr. Davis

was particularly anxious that the steamer should not be too early. I will show to your Honor afterwards that the correspondence which was offered here will show, that the main desire on the other side was that she must not be too early; they were crowded in getting out automobiles at their factory; the discussion at that time was the possibility of their cargo not being ready in case a vessel made early June.

That is strongly supported by the correspondence, as will be seen in a few minutes. Mr. Davis' testimony is this:

> "We were looking over the map and it seemed that the 'Cacicue' was about the only boat that we could figure on which would arrive here for June sailing."

They were figuring on a boat, if your Honor please, four months ahead, which had two long voyages ahead of her. The words "figure on" show that at that time Mr. Davis understood that there was no exact loading date, or exact date of arrival which could be determined, otherwise they would not have figured upon that vessel. If he at that time had required, or if the requirement of an exact time had been his object, would he not have made a contract which would have guaranteed or warranted June loading?

He testified he knew the difference between June loading and June [322] sailing. If it had been in his mind at that time that there was June sailing necessary, as he testified, could he possibly have subscribed to a contract which on the very face of it

never mentioned anything about June sailing, never provided anything about June sailing?

He testified that on February 25, two days before the date of the contract, he received this telegram from respondent:

> "Accept Grace offer 6200 tons. Confirm advising names and dates of sailing."

Mr. McCutchen asked him:

> "That was your authority to sign the contract, was it not, Mr. Davis? A. Yes."

There is nothing mentioned in that telegram giving him any instructions with reference to any sailing in June, or any loading in June, or any particular time of loading.

If the respondent had at that time considered it essential that the libelant should guarantee a June loading, would not such an essential have been mentioned in the authority that was given to Mr. Davis to make the contract? Under this authority which was given to him, he was certainly justified in making a contract which left the date of sailing, or even the date of loading, an elastic quantity—elastic, of course, within reasonable limits.

Mr. Davis' answer to the telegram, on February 27, was as follows:

> "Have signed with Grace American Steamer 'Cacicue' about June 24."

Would that be his answer if there had been any point made on [323] the part of these parties that there must be an exact loading date? Would he have said "about"? I submit to your Honor that this telegram is more consistent with "'Caci-

cue' loading about June" than it is with the contention of the other side that the "Cacicue" guaranteed to load in June was contemplated.

On cross-examination Mr. Davis said:

> "Q. Mr. Davis, do you remember that you told me in the presence of Mr. Moore and Mr. Florintine on that occasion that there was one feature you remembered distinctly, namely, that no exact time for the arrival of the 'Cacicue' was intended to be stipulated, on the ground that it was impossible, so long ahead, for any steamship man to fix any time?
>
> "A. For the arrival of the steamer?
>
> "Q. Yes. A. I believe I did."

Your Honor will remember that that statement was made after he had refreshed his memory by examining respondent's correspondence.

"Shipment per"—shipment by what method, by what ship, by what voyage? That is what the first line indicates. The second and third lines indicate the time of shipment. In other words, the meaning of the first line was, "Per American steamship 'Cacicue' June loading," meaning thereby per American steamship "Cacicue's" second loading after date. Then when the vessel is closer at hand I will advise you more definitely as to exact time. It does not say as to the exact day in June. We are entitled to the benefit of the meaning of the words. It says, as to exact date. The correct expression would have been, as to exact loading day, if it had referred to a day in June. "Date," in grammar and in the dictionary, means month and day. When the

vessel is nearer at hand I will advise you more definitely as to the exact day and month when [324] the loading is expected to begin.

This construction of the contract is strongly supported and confirmed by respondent's own practical interpretation of the contract as the actions and the correspondence between the respondent and Mr. Davis clearly show.

On February 28 respondent wired to Mr. Davis:

> "We need about 4000 tons in addition, say for late June early July sailing."

I cite that for the purpose of showing to your Honor that in making their contracts it was never intended to get any exact sailing date, or any exact loading date, or any exact date of arrival of a vessel.

"Say for late June early July sailing." The word "say" in this connection is significant.

On March 2d the respondent wired to Mr. Davis:

> "Understand you have arranged 6200 tons; this is all we will need to end of July."

March 3, respondent to Davis:

> "We have contracted 2000 and 6000 tons; understand you have engagement by steamer 'Cacicue' 6200 tons. We need only about 6000 tons in addition to what we arranged, and would like this for June-July sailing."

It seems to me that that covers the "Cacicue" case.

Then, evidently, they had too much tonnage and not enough cargo. On March 4 Mr. Davis wired to respondent:

"You have all the space required up to June and July, and will need no more until late July or early August."

That shows that the freight engagements of the respondent were not required or intended with reference to any exact dates at any time, but were always intended to be approximate only. [325] It also shows that present contracts extended to late July or early August.

On March 28 respondent advised Davis for the first time that it had only 4284 tons to cover a contract for 6200 tons, which Davis notes "with considerable surprise" on April 3. This date, March 28,—and that is about a month after the contract was made—wherein it appears clearly that the respondent has difficulty in filling his contract, it didn't have any 6200 tons to send. Thereafter, many attempts were made to make up the shortage, one being a contract made between Mr. Davis and Henry W. Peabody & Co., of San Francisco. This is an important contract in this connection, your Honor. It was made on May 5, 1916, in the form of a letter by Davis and accepted by Peabody. In this letter Davis contracts for 542 measurement tons of 40 cubic feet each, per W. R. Grace & Co.'s S. S. 'Cacicue' loading at San Francisco about July 1st for Sydney and Wellington. For the purpose of making up the deficiency in the cargo which was to go into the "Cacicue" under the contract of February 25, he contracts with somebody else for a cargo to fill this contract and to comply with this contract loading at San Francisco about July 1st.

Is this language consistent with the claim and the contention that there was a June loading guarantee? Does it not show, per American steamship "Cacicue" June loading, that they, themselves, say it means per American steamship "Cacicue" loading about July 1st?

On May 27 Mr. Davis informed respondent that the "Cacicue" would sail about July 10. On the same day he wrote to respondent:

> "We intend to go on and secure cargo if it is possible."

He understands that this contract must be carried out, although [326] "Cacicue" will not sail until July 10.

On May 31 he writes to respondent a very significant letter:

> "Any cars here after July 1st Union Steamship Company will give to Grace provided you will guarantee to Union Steamship Company sufficient cars in equal quantities later."

On May 31, therefore, Mr. Davis, himself, suggests a delivery to the "Cacicue" after July 1 if cargo is obtained from the Union Steamship Company; in other words, will fill this contract. It is within the terms of this contract, as he understands it, and he was a party to the contract.

On May 31 respondent writes to Davis in the following words:

> "It is a surprise to us to note that up until Saturday, last, we were still led to believe that the 'Cacicue' would sail on the 14th of June. This information, that she is not to sail until

> July 10, relayed to Australia some time ago, would have allayed a considerable fear on their part that shipments would arrive piling up one on the other, causing congestion to a considererable degree."

Isn't this a sign of relief, when they find out that they can prevent the congestion in Australia by the lucky circumstance that this vessel would not arrive as early as she was expected to arrive, and that they would not have to send these automobiles to Australia until a later time.

When he speaks of "a handicap at this end," he complains of the fact that he had been laboring under this idea, and had not been informed of the very pleasant fact that the "Cacicue" would not arrive until later than they had expected, and he speaks of not having been informed of that sooner.

In this connection it may be proper, also, to refer your [327] Honor to an allegation in the answer of the respondent, to the effect that it sold a large quantity of automobiles for delivery in New Zealand and Australia, actual shipment of which by water was required to be made during the month of June. It is upon that that they evidently base their contention that it was necessary to make a warranty of June loading in order to meet the Australian requirements.

If this correspondence does not show just the opposite, I cannot read the English language correctly.

On June 1st Mr. Davis, working with the Union Steamship Company on supplying the deficiency for the "Cacicue," wrote to respondent as follows:

> "They are willing to allow us to have any cars which might arrive later than July, 1st which we can turn over to Grace & Co. for the 'Cacicue.' "

The Union Steamship Company was willing to allow them to have any cars which might arrive later than July 1st.

Here is another solution of this car difficulty of supplying the 6200 tons: We can get some cars, all the cars which will arrive later than July 1st. Isn't that in confirmation of their understanding that this is a proper way of filling this contract?

On June 3 the respondent wrote a letter to the Ford Motor Company of San Francisco, sending invoices and bills of lading on autos "which we expect to go forward on the following steamers: 'Kilgardie,' June 3; 'Waimarino,' June 30; 'Cacicue,' July 12."

Your Honor will notice that the "Waimarino" was expected by the respondent to sail on June 30th—the last day of June. They expected the "Waimarino" cargo to go forward on that date; [328] they did not expect the "Cacicue" cargo to go forward until July 12.

With their difficulty in finding cargo, does not this naming of the two ships, the "Waimarino" on June 30, and the "Cacicue" on July 12, indicate how glad they must have been that the "Cacicue" did not come in in time for June 30, when respondent did not have the autos to fill the "Cacicue," and did not have the machines to fill the "Waimarino," as it appears incidentally from the correspondence?

It appears that there was trouble about the "Waimarino."

That shows that the respondent wanted the "Cacicue" very much for the 4000 odd tons, but not for the 6200 tons, and wanted the "Cacicue" very much for July 12 or a later loading than June, but disliked the rate. Certainly if the "Cacicue" shipment had gone forward on June 30, their troubles would have been multiplied, because it would have increased the congestion in Australia of which they speak in their correspondence.

On June 6th Mr. Davis replied to respondent:

> "Get freight moving. Grace now figures 'Cacicue' will clear July 5th; the rates are going down."

On June 7 Mr. Davis writes to respondent as follows:

> "We sincerely hope that you will be able to fill the space with your own cars"—after having tried to get cargoes from others unsuccessfully.

He says:

> "The movements of the boat led us to believe that it would be much later than the middle of June for her departure, and it is now our hope that she will even be as late as the 10th of July." [329]

That was their only salvation, that she would be as late as the 10th of July; they wanted her to be late; that was because their chances of finding sufficient cargo were improved by the late arrival, and that they were afraid she would arrive in June.

Down to May 27th the correspondence discloses an apprehension on the part of the respondent that the vessel would arrive too soon to enable them to supply this cargo. The last hope of the Union Steamship Company giving them the 1500 tons was now gone. The rates were falling. It became impossible for the respondent to fill the space without suffering loss. The congestion of cars in Australia caused an apparent necessity to cut down the "Cacicue" cargo, even from the 4075 tons by the Sydney, Brisbane and Melbourne cars. On June 9th the respondent wired to Davis with reference to the necessity of cutting down even the 4075 tons.

Now, this is an important stage in this correspondence, if your Honor please, about the beginning of June. The only salvation for the respondent to fill its contract was that this ship would not arrive too early. Then at that time the respondent hit upon this way out of the whole thing, namely, the theory of the June loading, the guarantee of the June loading, and getting out of the contract altogether. Thereupon witness Mr. Davis' sudden change of front on June 8th, when he wired respondent as follows: "Unless you intend reshipping Normandy cargo we think best stand firm on June loading," meaning, unless you can ship a cargo to arrive after July 1st, which will reduce or wipe out your damages, "cancel on the ground that the ship should have arrived before July 1st." [330] The Normandy contract was another way by which they could have made up that deficiency. So that meant that unless you can reship a cargo to arrive after

July 1st cancel this contract on the ground that the ship should have arrived before July 1st. And in all his letters to the respondent down to the day when he had legal advice, he understood that the contract which he had made would have been satisfied by loading the "Cacicue" during the month of July. This contract was never intended to give to respondent any right to cancel if the ship should not be ready to load until July.

That is what the correspondence discloses. I still think, if your Honor please—and I dislike to bring this question up again because it always stirs up something, but there is not the slightest reflection on the attorneys in the case, I say I still think that more light yet would have been thrown upon this phase of the case if the people in the office of the Ford Motor Company of San Francisco had not destroyed the correspondence before this contract was made. I still am entitled to any proper and fair inference which can be drawn from that fact, that these people destroyed a correspondence after an important lawsuit was pending with reference to it.

The contract, itself, I think, without doing any violence to the language, can be properly construed as the libelant construes it. But, in addition to that, all the circumstances show that all of the parties to this contract, the parties who made the contract, Mr. Moore, Mr. Davis, Mr. Carter, understood that there should not be a guarantee in that case. And the correspondence shows that it did not suit the respondent at all, and it never dreamed of

such a thing [331] until the time came when they could not fill their contract, when they could not get the machines, when they could not fill the ship at all, and they had to hunt around for a straw to cling to.

My next point is that respondent was never ready or willing to perform its contract.

A month after making the contract, on March 28th, the respondent wrote to Davis, or wired to Davis:

> "We will need only 4284 tons of this capacity; that we do not need the 6200 tons is due to the fact that we have succeeded in obtaining two steamers from the New Zealand Shipping Company, taking a considerable number of cars which would otherwise have had to go by steamer 'Cacicue.' "

Here is a clear indication that we are not going to furnish 6200 tons, we are not going to stand by this contract. The reason given is that they have made another contract, a contract with the New Zealand Shipping Company, which leaves the Atlantic Coast directly, and which would save all the railroad freight across the continent.

April 4, respondent to Davis:

> "Sent difference between 4282 and 6200 tons by another cheaper steamer."

April 19, respondent to Davis:

> "We are supposed to have 6200 tons on this steamer; actually we have cars for only 4572 tons; we engaged space for certain cars by the

steamship W. & P., which otherwise would have gone on the 'Cacicue.' "

On May 20, respondent to Davis:

"We had not assumed that we were going to be held for 6200 tons space." [332]

The letters of June 1 and June 6 sent to libelant clearly show that 4075 tons is the most that respondent ever had ready for this contract.

The evidence and the correspondence show that the real reasons for this inability and the unwillingness of the respondent to perform this contract were the following:

In the first place, the "Cacicue" cargo had been diverted to vessels offering a cheaper freight, a $35 freight instead of a $47.50 freight.

In the second place, there was a new method of crating invented by the factory, and that reduced the tonnage. On May 11 respondent wrote to Davis:

"We advised you some time ago that we would have 1316 cars for the 'Cacicue,' but we find it impossible to ship this number on account of new method of crating."

On May 25 they say:

"We had warned them (the factory) that cutting down the space on the knocked down shipment during the progress of the filling of any contract would materially alter our calculations. They, however, went forward with these experiments."

That fact, alone, interfered with the carrying out of their contract. Evidently, they had over-

contracted for space, for more space than they could fill.

The third real reason for the inability was the congestion in Australia. That congestion made it desirable to cancel some of these contracts, if they could, or, if not, to at least extend the loading dates of these contracts.

On May 31 the respondent wrote to Davis:

> "This information (that the 'Cacicue' would sail later than expected, when it was expected that she would sail on [333] June and did not like it but were glad to learn that she would not sail until July 12) relayed to Australia would have allayed considerable fear on their part that shipments would arrive piling up one on the other, causing congestion."

On June 9, respondent wired to Davis:

> "Owing congestion Australia may be necessary cut down 'Cacicue' cargo by Sydney, Brisbane and Melbourne cars, and ship these later."

In other words, on June 9 even the 4075 tons would have been cut down by the Sydney, Brisbane and Melbourne cars. And if your Honor would care to see how many tons that left, your Honor will note that if they had carried that out in their own interests there would have been hardly any cargo left for the "Cacicue." The only cargo that would have been left would have been the Wellington and New Zealand cargo, and that was comparatively a small portion.

I call your Honor's attention to the allegation in

the answer, that the Australian contracts require actual shipments by water in June.

The fourth real reason for the inability, or, rather, the motive for the inability of the respondent to perform, was the drop in freight rates and the engaging of cheaper freight. As early as April 4 respondent advised Davis that they made certain space engagements for May, for which we received a very advantageous rate by the New Zealand Shipping Company out of Montreal, a rate of $35 per ton. That was $12.50 a ton cheaper than this rate, and in addition to that, it saved the transportation across the continent. Those were the real reasons.

Now, if your Honor please, what were the pretended reasons, [334] the reasons given to the libelant in this case, and to Mr. Davis?

First, they started in in the east, telling Mr. Davis that they never received his contract, hence they assumed that it was not binding. That is a very false reason. Your Honor remembers the early telegrams by which they were informed by Mr. Davis very promptly, wherein he said he had made a contract for 6200 tons. Now, that is not an honest way of getting out of it.

The next reason given to libelant was that "June loading" requires in the parlance, as they express it, June sailing. That certainly is not a correct reason.

Then another reason that appears from their correspondence with libelant was that Mr. Davis was not authorized, drawing a distinction between the Ford Motor Co. of Canada and the Ford Motor Co.

of San Francisco, in effect that the Ford Motor Co. of San Francisco had no right to make such a contract.

Our third point is that the correspondence shows existence of deliberate intention on the part of respondent not to perform this contract.

As early as March 28 the respondent wrote to Davis:

> "We will need only 4284 tons of this capacity."

On April 19th:

> "We are supposed to have 6200 tons on this steamer, we have cars for only 4572 tons."

May 11th:

> "Advised you some time ago that we would have 1316 cars for the 'Cacicue,' but we find it impossible to ship this number." [335]

May 16th:

> "Total cubic measurement from shipment for 'Cacicue' 4084 tons."

May 26th:

> "Total cargo will be 4075 tons."

June 1st:

> "We have shipped 1290 autos for Grace."

June 3d:

> "Which we expect to go forward 'Cacicue' July 12th."

My next point is this: Respondent committed an anticipatory breach of the contract. This phase of the case is fully covered by our opening brief on the exceptions, and all the authorities are given in our opening brief.

I will refer your Honor to that as to the law. I do not think it is necessary to refer to that, because I take it that your Honor, in passing upon the question before you at that time, examined those authorities.

Mr. McCUTCHEN.—It is proper to say that his Honor considered that at that time for a limited purpose. I suggest that to you so that if you see fit you can cover your case fully as to that point.

Mr. HENGSTLER.—In addition to the authorities given in that brief, to which I refer your Honor, I have here added a few other ones since discovered:

Giving notice that respondent would not perform at all, unless the contract was modified, is a breach.

That is what was done in this case. The respondent notified us that they would not perform at all unless the contract was modified. They told us, "We won't give you anything unless you take less than what you agreed. We agreed to 6200 tons, [336] but we won't give them to you, we will give you 4075 tons. Unless you accept this as a new contract, we will not perform at all." That is the gist of what they said to us.

Declaring an intention not to be bound by the contract, is a breach.

Insisting upon new terms different from the original agreement, is a breach.

The new authorities I refer your Honor to in addition to the brief on file in this court are cited here:

Johnson Forge Co. vs. Leonard, 51 Atlantic, 305;

Bryson vs. McCone, 121 Cal. 153;

Anson, Contracts, 283.

The fifth point is libelant's right of action had accrued on July 27, when this libel was filed.

Assuming the existence of an anticipatory breach, a *prima facie* case for damages existed; and accepting the law of this case as declared in your Honor's opinion in deciding exceptions to the answer, the Court is bound to render a decree for the libelant. The only question now remaining is as to the amount of the damages.

Presumptively, the amount of the damages is the sum which the libelant would have received from respondent for the space engaged, had it fulfilled its contract, less the amount actually received for said space from respondent and outsiders, under contracts made in mitigation of damages. Libelant is *prima facie* entitled to a decree for such damages against respondent.

The burden of showing that the amount of damages suffered by libelant is less than the substantial damages presumptively [337] sustained—or of showing that libelant suffered no damages at all is on the respondent.

The respondent's defense is that the libelant has suffered no damage because of absolute and insuperable disability on its own part to perform. If respondent is successful, libelant would be entitled to only nominal damages.

However, there was no absolute and insuperable disability on libelant's part to perform. If your Honor adopts libelant's construction of the contract, there certainly was no absolute and insuperable disability on libelant's part to perform, because the contract was carried out in accordance with the contract as libelant construed it. The libelant was, in fact, able to perform in July, and did load in July, and could probably have commenced earlier than it did, which negatives any alleged disability on libelant's part to perform. In that case libelant is entitled to a decree for the actual damages suffered.

Secondly, in case the Court adopts the respondent's construction of the contract and decides that it was libelant's imperative duty to begin and end loading (*a fortiori, to sail*) in June, and the facts show an absolute and insurmountable disability to begin and end loading in June, the libelant is entitled to a decree for nominal damages, and only nominal damages.

Third, in case the Court adopts respondent's construction of the contract to the extent of holding that it was libelant's imperative duty to begin loading in June, and the facts show a disability on libelant's part, the libelant would be entitled to a decree for actual damages suffered, if the delay in the beginning of the loading was caused by the respondent; or for [338] nominal damages only under the law, as your Honor has declared it, at that time and otherwise here, if the delay in the beginning of the loading was not caused by respondent.

The doctrine of the waiver of the anticipatory breach, upon which Mr. McCutchen and the other side rely so much, I think is a false quantity in this case, because in either way, it does not change the effect which I have stated.

I think I have consumed one hour now, and, if your Honor please, I will save my remaining time for answer to Mr. McCutchen's argument.

## ARGUMENT OF EDWARD J. McCUTCHEN, ESQ.

Mr. McCUTCHEN.—If your Honor please, I think I shall take up the argument of counsel, or, rather, the points discussed by him in the inverse order.

This is a libel to recover, according to the terms of the libel, damages for a breach of a contract of shipment, the breach being alleged in very plain and unambiguous language to have occurred on the 23d and 26th days of June. I think I may be wrong about that. My impression is that the libel alleges that the two breaches occurred on the 24th and 26th days of June. However, it appears very clearly here that the two letters which were claimed to operate a breach of the contract, were received by the libelant on the 23d and 26th days of June. Whether those two letters contained language which would warrant an interpretation that they did amount to an anticipatory breach of the contract has been a subject of earnest discussion by counsel representing the respondent. Much might be said [339] in support of the contention that they did not contain that positive, unequivocal, unconditional

declaration of an intention not to perform, which must have existed in order that they could be construed or held to be an anticipatory breach of the contract.

I think for the purposes of the argument we can accept the contention which counsel makes in that respect and go without delay to other features of the case. Those letters, as I have said, were received on the 23d and 26th days of June. After they were in hand, they were replied to by the libelant, and replied to in no uncertain terms. It will not be necessary to read the letters, because there were two letters sent, one to the respondent, in Canada, and the other to the Ford Motor Company of San Francisco, and each of them set forth this telegram:

> "Referring to your contract with us, of date February 25, 1916, wherein you agree to ship 6200 tons 40 cubic feet each of automobiles and parts in packages at $47.50 per 40 cubic feet measurement, freight prepaid, since you have informed us, in your letters of the 14th and 24th instant that you will not deliver to us the 6200 tons which you agreed to deliver, we now have to advise you that we stand strictly upon the contract made with you, and insist upon your fulfillment of the same in every particular. We are, and have always been, ready to perform all of our obligations under said contract. We further advise you that we will take such quantity of automobiles as are delivered to us, and hold you responsible for all

damages, including demurrage, which we may ultimately sustain by reason of any breach of said contract. By taking a smaller quantity of automobiles than the quantity which you [340] contracted to deliver, we do not accept such smaller quantity as a full satisfaction of the contract of February 25, but only as the partial satisfaction which it, in fact, is."

Now, then, let us return for a moment to the last suggestion made by Dr. Hengstler:

"Assuming that libelant had waived the breach on June 26th or 28th, yet respondent was guilty of a breach on June 29."

Don't you mean June 27, Doctor?

Mr. HENGSTLER.—That the respondent was guilty of a breach on June 27.

Mr. McCUTCHEN.—The reason I asked that was, the language here is June 29. We will read that, then, as June 27.

"Had no 6200 tons ready and no intention to supply 6200 tons. This breach was anticipatory to performance by libelant which could properly begin on June 30."

Mr. HENGSTLER.—Mr. McCutchen, to clear up this question of June 27 and June 29, my point is that there was an anticipatory breach, and there was a continuing breach.

Mr. McCUTCHEN.—Yes.

Mr. HENGSTLER.—There was a breach at the time the libel was filed, and there was a continuing breach.

Mr. McCUTCHEN.—Yes. Now, I understand that to be upon the theory that it was the obligation of the respondent to deliver 6,200 tons of freight upon the dock before the 29th of June. Is that the contention, Doctor?

Mr. HENGSTLER.—Yes.

Mr. McCUTCHEN.—That it is the contention that the respondent was compelled to deliver 6,200 tons of freight upon the dock on the 29th of June?

Mr. HENGSTLER.—Not at all. [341]

Mr. McCUTCHEN.—Then I do not think I get the point.

Mr. HENGSTLER.—That is not the contention.

Mr. McCUTCHEN.—I do not get the point.

Mr. HENGSTLER.—I do not know if there is room enough for 6,200 tons on the dock.

Mr. McCUTCHEN.—Now, what was the obligation of the respondent, so far as loading was concerned? That is to say, so far as supplying freight was concerned. Its obligation was that freight was to be delivered alongside steamer at San Francisco as fast as the vessel can load, and we have the unqualified statement of the manager of the libelant that it is extremely doubtful whether the vessel could have taken upon board a single package of freight during the month of June.

If the telegram of June 27 was an election to continue the contract in force, what was there in the conduct of the respondent after that which amounted to a renewal of the breach? Now, mind you, this is an action for breach of the contract brought before the time fixed for performance by the respond-

ent had arrived. Under the terms of the contract, assuming it to be susceptible of the interpretation which counsel puts upon it, the respondent had at least until the 11th of July to deliver the freight on the dock, because it was not until the 11th of July that the ship came back from the drydock, and on the 11th of July, or long before the 11th of July, the 1100 packages of freight which had been placed by respondent upon the dock, delivered into the possession of the libelant, was in the hands of the United States marshal, under a proceeding in rem, instituted by libelant.

Now, I hesitate to take up the time to argue to your Honor that it cannot be seriously contended, at any rate, that there [342] is no ground for the contention, that the respondent did anything after its letters of June 12 and June 24 that indicated to libelant that respondent did not intend to perform. Let us for a moment see what the situation was, if that is relied upon—and, by the way, it is not relied upon in the libel; I say the libel declares that the breach consisted in the writing of the two letters of June 14 and June 24. Now, to sustain the suggestion which I have named, that the ship could not have loaded any freight in June—

The COURT.—Before you pass beyond that last point, what effect, if any, would the advice to the railroad company not to load or not to deliver any freight have?

Mr. McCUTCHEN.—The advice to the railroad company was, "Until further instructions do not

deliver any more freight." That letter to the railroad company could not have been a continuing breach, as counsel claims it to be, because we were under no obligation to deliver freight at that time. The ship was not in a condition to receive it. We do not know, so far as this record is concerned, what the reason for that instruction was. It may very well have been that there was a strike of stevedores, and that there would have been great danger in piling up freight on the wharf. But there is nothing in that letter written to the railroad company which indicates that that was an instruction which was permanent, if I may use that expression. The letter says plainly and expressly "until further advised."

Mr. HENGSTLER.—Did you ever revoke it?

Mr. McCUTCHEN.—Counsel asks whether we ever revoked it. It makes no difference whether we revoked it. It was a communication to the railroad company; it was not a communication [343] to the libelant, and even if it had been a communication to the libelant, it would not have amounted to an anticipatory breach. Suppose we had written a letter to the libelant at the time that was written, and, by the way, it was written on the 22d of June, and the allegation is that deliveries were made on the 23d and 24th days of June, following the writing of that letter; there can be no doubt about that, as set forth expressly in the libel. Suppose we had written a letter to the libelant and it said, We have told the Southern Pacific that for the time being it is not to deliver any more freight

on the dock? Would that have amounted to a breach? The libelant can claim no more for that letter than if it had been addressed to the libelant; it was not addressed to the libelant, and it is extremely doubtful when the libelant knew of it. I think it might be taken as a foregone conclusion that that letter played absolutely no part in shaping the course which the libelant pursued.

Mr. Carter says, on the subject of ability to receive freight:

> "Normally, we could have discharged that cargo on the 27th, 28th and 29th, in time to commence loading on the 30th, but with this strike which had come up within a few days prior to the arrival of this ship, I am not at all certain that that could have been done.
>
> "Q. Are you in doubt about that?
>
> "A. Yes.
>
> "Q. On the morning of the 27th of June, and before this libel was filed, did you not know that the 'Cacique' could not take on a pound of freight, even up to the last minute of the last day of June? A. No.
>
> "Q. Did developments subsequently take place which satisfied [344] you that the ship could not take on any freight before the last minute of the last day of June? A. Yes.
>
> "Q. You say that you tried to discharge the cargo within these three days which we had if possible: What was it that induced you to try to discharge the cargo within those three days?

"A. For the reason that the Ford Motor Co. were to base their case, their argument with us, precisely on that point, and while I personally did not believe that position was correct, I at the same time wanted to avoid that point if possible."

I read from page 97 of the transcript.

"Q. You continued your effort to discharge the cargo, didn't you?

"A. Not beyond a very short—not beyond the very first day; I think by that time the split had occurred between us, and we knew it was impossible to go ahead at all."

Now, when had the split occurred?

"Q. And then you let up in your efforts to discharge the cargo?

"A. Yes; in other words, we did not do the work which we could have done had the dispute not arisen."

In answer to the interrogatories propounded shortly after the filing of the libel the witness stated under oath that had there been no strike, and competent stevedores available, the steamer could have been completely discharged before the 30th of June.

"Q. You say now that you let down in your efforts to discharge the steamer?

"A. Exactly. We could have secured more men had it been necessary, but in my opinion we could not have secured enough men to have completed that discharge in June, on account of this strike.

"Q. Then we may take it for granted in this case that with all the energy you could have displayed, you would not have been [345] ready to take freight on board that steamer before the end of June?

"A. Not with the steamer with clean holds; we could have commenced loading in her 'tween-decks, which had been discharged, which procedure I had considered."

He says that in order to comply with the port regulations, it was necessary to fumigate the vessels coming from an Oriental port, that this vessel was fumigated; that at the time she was fumigated there was no cargo on board, and that that was the usual course.

"Q. You did not know, then, at the time you filed the libel, that you could not load any freight in June?

"A. We did not know that it would be impossible to load freight, part of the cargo, in the 'tween-decks, for instance. I had despaired that we would be able to discharge the vessel with the men that we probably could get.

"Q. Were you in doubt on the 27th of June, when you filed this libel, that you would be able to load any cargo on the ship during the month of June?

"A. No; we expected to load part of it during the month of June.

Now, by the way, it should not be forgotten that on the 22d of June Mr. Moore wrote a letter to the Ford Motor Company here and to the Ford Motor

Company of Canada, stating that delivery of freight was to begin on the 27th of June and be completed by the 29th of June; and on the 23d and the 24th days of June these 1100 packages were delivered on the dock.

"Q. At the time you filed the libel?

"A. Yes.

"Q. How much did you expect to load during the month of June, at the time you filed the libel?

"A. Very little. My idea was that we could clean out possible two 'tween-decks of the vessel of the inward cargo, and load those 'tween-decks [346] with these Ford cars before June 30th, and establish this point of June loading.

"Q. Well, that would have been—without wanting to be offensive—just a piece of camouflage, wouldn't it?

'A. I have never seen it done before, and whether it would be effective, I am not at all sure.

"Q. That would, at most, taking your opinion of it, have been a pretense at performance, and that only, wouldn't it?

"A. I would hardly say that.

"Q. Well, it would not have been, in your opinion, as you look at it now, a genuine beginning of loading, would it?

"A. Do you mean legally, or actually?

"Q. No, I mean in your view of it, looking at it as a common sense proposition.

"A. It would be a genuine loading, provided you could have completed loading by doing so.

"Q. Don't you know that if you had tried anything of that kind your loading would have been delayed?

"A. Not necessarily delayed, but it is very probable that it would not have been increased.

"Q. Then if it could not have been increased, it would have been a pretense?

"A. Exactly."

Now, I will refer to it more extensively on another branch of the case. There was another reason, an insurmountable reason, why the failure to deliver freight there or all of the freight by the 29th of June could not have been a breach of this agreement. This ship went into drydock, and they knew it would have to go into drydock, and they had no right to put on board the ship a pound of this respondent's freight and then send the ship into drydock.

Mr. HENGSTLER.—Will you state why, as a matter of law? [347]

Mr. McCUTCHEN.—I have a case that seems to decide it very conclusively. I will call attention to that now.

Mr. HENGSTLER.—I will give you the case of the "Indrapura." That point is not involved here, because it could be done. There would be a custom to take cargo into a vessel and take the vessel into drydock after the cargo was on board.

Mr. McCUTCHEN.—You did not show any such custom.

Mr. HENGSTLER.—It was not necessary in this case.

Mr. McCUTCHEN.—But it was shown that if you had put any cargo on board you would have taken the ship into drydock with the cargo on board.

Mr. HENGSTLER.—I do not think the testimony shows that Mr. Carter knew he had to go to drydock.

Mr. McCUTCHEN.—That will break into my argument a little, but I will take that up right here. We could not get from Mr. Carter any very exact statements as to when Grace & Co. were advised of the condition of the ship, but he did go this far, that the captain undoubtedly advised Grace & Co. before noon of the 27th that the ship had been surveyed in Hongkong, and undoubtedly, as Mr. Carter says, delivered them a copy of the survey report. The ship did come here in a leaky condition. Whether Mr. Carter knew that it was leaky or not is beside this present question, but Mr. Carter, or someone connected with Grace & Co. must have known on the morning of the 27th that the ship was in a leaky condition. Now, that something occurred on the morning of the 27th of June, following this telegram of June 26th, which induced Grace & Co. to take a course different from that indicated in the telegram of the 26th of June, is almost a certainty. What could that have been? What could it have been? Now, [348] couple with that what we learned afterwards, what Grace & Co. must have known at the time, that this ship had been surveyed

in Hongkong, that she had been permitted to go on the voyage from Hongkong here only upon the theory that she could not carry oil in one of her tanks, that on the trip over here she sprung a leak, a leak in the forepeak—they might not have known at that time what caused that leak, but that they knew of the leak is to be taken, as I say, as an admitted fact in this case. At any rate, the Captain, their agent, knew of the leak. But it is inconceivable that the Captain would have gone to the office of Grace & Co. during the forenoon of the 27th of June and have not communicated to his employer the important information, in addition to the Hongkong survey, the important information that the vessel had sprung a leak in the forepeak. Now, that is the explanation, and the only explanation. That, coupled with the fact that Mr. Carter knew they couldn't load any freight in June, is the only explanation for this precipitate act on the part of the libelant. Having expressly told the respondent in this telegram of the 26th of June that it insisted upon performance and that it would take the 4075 tons of freight as part performance, which it, in fact, was—to use the language of the telegram—we are without any possible explanation of its change in front on the following day, except that it then knew that it could not take the freight on board, and that the vessel would have to go into drydock.

Now, Mr. Carter says they were very well advised of the position of Ford & Company; they had been advised of the position of Ford & Co. in the letter of June 1, addressed to them—not addressed

to Mr. Davis, addressed to Grace & Co., in which they [349] said: "We understand now you have taken out a clearance for this ship for the 5th of July. Now, we want you to understand that this contract calls for a sailing in June, and we do not propose to waive any of our rights in that respect." Now, as I say, Mr. Carter knew in the forenoon of the 27th of June that the ship could not load any freight, even up to the 1st of July. And he knew beyond that, and more important than that, that the ship could not take on any freight until she went into the drydock and returned to her dock. So, doesn't it seem idle to argue that we could not breach this contract, because we did not have all of our freight on the dock by the 29th of June? I do not know that it cuts very much figure in this case, but it might be worth while to call attention to the letter of June 28th, written by Grace to the respondent—by the way, it is a telegram—in which they say:

> "Please take notice that in accordance with our previous advices the steamship 'Cacique' was ready to load your cargo contracted for on February 25, 1916, on June 27, 1916, at nine P. M. As you have failed to deliver the cargo alongside steamer as fast as vessel can load, demurrage at the rate of three thousand dollars per day commences on the day and at the hour last mentioned.

We know they were not ready to load at that time, so when counsel talks about the lack of good faith of this respondent, I must say I do not think

there is anything in the conduct of the respondent—

The COURT.—I will say frankly that they made a very good paper case on each side.

Mr. McCUTCHEN.—I was going to say that it might be said [350] in favor of the respondent that what it had to say it said. Now, this letter of June 28th states what is plainly and clearly not the fact; that ship was not ready to load any freight on the 27th of June.

Now, with reference to this letter to the Southern Pacific Company, which I say was written on the 22d, and we made these deliveries on the 23d and 24th, suppose that when that ship was ready to load there had been upon the dock the 4,075 tons called for by the telegram of the 26th, would it be contended for a moment that counsel could claim, as he is now claiming, that because of that instruction to the Southern Pacific that we were guilty of another breach?

Mr. HENGSTLER.—4,075 tons was not all that should have been there. There was 6,200 tons.

Mr. McCUTCHEN.—I do not claim they ever had 6,200 tons there, but I claim you told them they must deliver 6,200. So I say there is absolutely nothing in the conduct of the respondent that puts it in default; nothing, I mean, subsequent to these letters of June 14 and June 24, which puts it in default of performance of this contract.

Now, then, that being the situation, on the 27th this libel was filed, in which, as I stated, the alleged breach was the breach which was created by the writing of the two letters.

Going back for a moment to the notice with reference to the Southern Pacific delivery of freight, Mr. Carter testified to some facts with reference to that, and his testimony was stricken out, and he came back in the afternoon and took the stand again, and counsel asked him some further questions which your Honor permitted him to answer, and on cross-examination he was asked whether he complied with the demand of the Southern [351] Pacific which had been made upon him, and he said he did not. He said this first, he held these packages as freight, and when he was requested by the Southern Pacific Company to deliver them back he declined to deliver them back. He also testified on cross-examination that when he filed the libel on the 27th of June he had these 1,100 packages on the wharf as freight, and was holding them as freight, and when he filed his libel he made it a proceeding in part *in rem* against those 1,100 packages of freight on Pier 26.

I would have been glad to hear from counsel on the other side some explanation for that proceeding *in rem*. He has not given us any explanation, and, therefore, it is not possible to reply to his view with reference to that.

Mr. HENGSTLER.—I should like to hear your view, if you think there is anything unusual or suspicious about that proceeding.

Mr. McCUTCHEN.—No, I do not think there was anything unusual or suspicious, but I think it is perfectly clear that you had no proceeding *in rem* except against these packages as freight, and under

your contract of affreightment, you had no other right to hold them; you had no other right to decline the request of the Southern Pacific for the return of them, if such a request was made. I will ask you now, what right had you, your libel not then having been filed, to hold that freight?

Mr. HENGSTLER.—Do you want me to answer?

Mr. McCUTCHEN.—Yes, I will be glad to have you do so.

Mr. HENGSTLER.—In the first place, we did not hold it as freight, and, in the second place, we commenced a proceeding on foreign attachment. [352]

Mr. McCUTCHEN.—Now, counsel says in the first place he did not hold it as freight; that is entirely at variance and absolutely irreconcilable with the statement of his client. Is it necessary for me to go to the record and read that?

Mr. HENGSTLER.—That is a question of fact which the Court will decide from the whole testimony. I tried to clear up that remark with him once, and you objected to it. He might have inadvertently said so, but I think the whole testimony does not show that. That is for his Honor to decide. I think the testimony fairly shows that whatever there was on the wharf at that time was placed by the Southern Pacific on the wharf there by mistake.

Mr. McCUTCHEN.—I must say I do not find any testimony in the record to support that.

Mr. HENGSTLER.—It was never received by the libelant; it was on its wharf physically. They

had no right to take those 1,100 packages, under the circumstances existing.

Mr. McCUTCHEN.—Does that mean that you had no proceeding *in rem* against them at that time?

Mr. HENGSTLER.—It means that I had a proceeding on a foreign attachment against you.

Mr. McCUTCHEN.—That was all that you had?

Mr. HENGSTLER.—That was all.

Mr. McCUTCHEN.—I take that to be an admission that they were not entitled to proceed against the property *in rem* at that time.

Mr. HENGSTLER.—Oh, no; I did not make any admission like that. I said that I had a proceeding on a foreign attachment against you. I do not understand what is your point. A proceeding in foreign attachment is, to a certain extent, a proceeding [353] *in rem.*

Mr. McCUTCHEN.—But the unfortunate part of the position of counsel in that respect is that his foreign attachment has nothing to do with the portion of this property against which he proceeded *in rem.*

I am reminded that counsel said that his witness inadvertently said something. I am inclined to think that Mr. Carter would consider that a reflection upon himself. I think Mr. Carter considers himself quite an accomplished sea lawyer. He knows the rules that apply in matters of that kind; he knew just exactly what he was doing.

The COURT.—A sea lawyer and an admiralty lawyer are different things, aren't they?

Mr. McCUTCHEN.—I don't know, your Honor.

Mr. HENGSTLER.—Fortunately.

Mr. McCUTCHEN.—Mr. Carter did not make that answer inadvertently; he knew just the answer he was making. He made it twice. He made it first in answer to the question: "Didn't you when you filed this libel have that property in your possession as freight? A. Yes, we did.

"Q. And you proceeded to foreclose a maritime lien upon it? A. Yes, we did."

And again, when he was questioned about the information that had come from the Southern Pacific, and requested for a return:

"Did you comply with that request?

"A. No, I did not.

"Q. You kept the property? A. Yes.

"Q. And you proceeded to foreclose the lien on it? A. Yes."

Mr. HENGSTLER.—That is not all, is it?

Mr. McCUTCHEN.—No.

Mr. HENGSTLER.—I am willing to leave it to whatever the [354] testimony shows.

The COURT.—That is substantially his testimony.

Mr. McCUTCHEN.—Now, then, is it within the possibilities that this libelant could hold the property which it received as freight, and proceed against that property *in rem,* against which it would have an action of that kind, or a proceeding of that kind only under a contract of affreightment and then be permitted to say that it had prior to that time taken an advantage of an anticipatory

breach of this agreement by the respondent? If this libelant desired to take advantage of that anticipatory breach, it must have done it in such a way as to have left absolutely no doubt what its position was. Did it take action that left no doubt as to what its position was? Having demanded that the respondent should comply with the agreement, and having gotten into its possession 1100 packages of respondent's property under that agreement, it kept that property in its possession, and proceeded against it in this Court, not as would have been done if they had been seeking simply a personal judgment, in which case the 1100 packages of freight would not have been referred to in the title of the case, but proceeded against it under their contract of affreightment; they could not proceed otherwise. Now, if they intended at the time this libel was filed to treat this breach as anticipatory, was it not their duty to put the respondent back to where it was before it had made that delivery? Whatever may be said with reference to this phase of the case, they thought they had some advantage by reason of the fact that they had possession of the freight, and they proposed to maintain that advantage. Now, wouldn't that amount to, adopting your Honor's suggestion of the other [355] day, to killing a contract for one purpose and keeping it alive for another?

The utmost good faith on the part of this libelant would have required, as I stated, when it concluded to go back to these breaches, if they were breaches, of the 14th and 24th of June—good faith required

that it should have said to the respondent, "Come and take your freight." Good faith required that it should have said to the Southern Pacific Company, "Take this freight." But, instead of doing that, it denied to the Southern Pacific Company its request for the return of the freight, and it told the respondent that it insisted upon the performance of the contract.

I do not know that it is necessary to cite any law to your Honor on this subject, but I have two or three cases that I will make short quotations from.

Avery vs. Bowden, 5 Lel. & B. 714, was a case in which it appeared that the defendant chartered plaintiff's ship to sail to Odessa and there take a cargo, loading to be done within a certain number of days. When the vessel reached Odessa, the defendant's agent refused to supply one. The lay days had not expired. The master remained at Odessa and continued to demand a cargo. Before the lay days expired, war broke out between England and Russia, which rendered performance of the charter-party illegal. In a suit for breach of charter-party it was held that as the master had not accepted the renunciation of the charter-party, there was no actual failure of performance before war broke out, and that, therefore, defendant was discharged from the contract by the break of war. The Court said:

> "According to our decision in Hochster vs. De La Tour [356] (2 E. & B. 678), to which we adhere, if the defendant, within the running days and before the declaration of wa*y*,

had positively informed the captain of the 'Lebanon' that no cargo had been provided or would be provided for him at Odessa, and that there was no use in his remaining there any longer, the captain might have treated this as a breach and renunciation of the contract; and thereupon, sailing away from Odessa, he might have loaded a cargo at a friendly port from another person; whereupon the plaintiff would have had a right to maintain an action on the charter-party to recover damages equal to the loss he had sustained from the breach of contract on the part of the defendant. The language used by the defendant's agent before the declaration of war can hardly be considered as amounting to a renunciation of the contract; but, if it had been much stronger, we conceive that it could not be considered as constituting a cause of action after the captain still continued to insist upon having a cargo in fulfillment of the charter-party."

A leading case upon this subject which has been very generally approved, expressly approved by the Supreme Court of the United States, is Frost vs. Knight, Law Reports, 7 Exch. 111, the opinion in which was by Lord Cockburn. The action was for a breach of contract of marriage. The Court said:

"The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance; but in that

case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his [357] previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.

"On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the nonperformance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

In Marks vs. van Eighen, 85 Fed. 853, the Court said:

" . . . if the latter elects"—that is, the injured party—"to treat the contract as terminated, his right of action accrues at once. The latter, however, must elect whether he will treat the contract as terminated, or as still existing."

Now, of course, the injured party in that case has but one election. These people, that is to say, the libelant, made its election.

Now, suppose there never had been any letters like those of the 14th and the 24th of June, would

anyone contend for a moment that an anticipatory breach of this contract was shown by the letter to the railroad company? And isn't that what it brings itself back to? By the refusal to set forth in the telegram of the 26th, the parties were placed back just where they were before the letters of the 14th and 24th of June were written and in order that the letter to the Southern Pacific Railroad Company could have constituted a breach, it must have amounted—and it must have gone to the libelant, too,—it must have amounted to an absolute refusal to perform the contract, [358] and it is not possible to give it any such interpretation. In considering whether it did amount to an anticipatory breach, your Honor would indulge every presumption in favor of the respondent. You might possibly seek for some reason for the writing of the letter, but it would not be necessary for you to do it. But if any genuine reason could have existed that would be presumed, even though the letter were not stronger than it is; but I think it is sufficient to say that that letter simply says that for the present you are not to deliver any further freight.

On this subject of anticipatory breach, I have on my notes, and I think there was cited to your Honor, when the preliminary proceeding was on, the case of Wells vs. Hartford Manila Co., reported in 55 Atlantic, at page 599; I shall read from page 602. The case is a Connecticut case:

> "These limitations contained in the rule prevent a party to a contract from occupying an equivocal position with respect to it. The par-

ties have mutually elected to treat it otherwise, and given unmistakable evidence of such an election. A renunciation does not create a breach. There must be an adoption of the renunciation."

And again, as bearing upon this Southern Pacific matter, if it is claimed to be a renunciation, "the renunciation must be so distinct that its purpose is manifest, and so absolute that the intention to no longer abide by the terms of the contract is beyond question."

Mr. HENGSTLER.—I should like very much for you to read that letter of the 22d, because I think that letter clears up one of the contentions made.

Mr. McCUTCHEN.—Yes. That letter is—counsel read a lot [359] of the matter that was on the letter-head that does not have anything to do with this letter:

"Confirming our telephone conversation of recent date, until you are authorized to do so please do not under any circumstances deliver any of the cargo at present on hand booked steamer 'Cacicue' to W. R. Grace & Co."

Mr. HENGSTLER.—You notice, "at present on hand" belongs together.

Mr. McCUTCHEN.—Yes. That suggests a question to me: Do you claim that that affected the 1100 packages that had been delivered?

Mr. HENGSTLER.—No. I claim that it does not mean what I think you contend for, that it was intended to express the idea, "do not deliver any o

this cargo at present." It means nothing of that sort.

Mr. McCUTCHEN.—Now, I had not intended to cite these cases. In view of what I said with reference to counsel's contention regarding the letters of June 14 and June 24, and in view of his attitude with reference to this railroad letter, I will read them:

In Roehm vs. Horst, 178 U. S., page 1, it is said:

> "We think that there can be no controlling distinction on this point between the two classes of cases"—that is to say, one for an anticipatory breach and one for an actual breach, with reference to certain claims—"and that it is proper to consider the reasonableness of the conclusion that the absolute renunciation of particular contracts constitutes such a breach as to justify immediate action and recovery therefor. The parties to a contract which is wholly executory have a right to the maintenance of the [360] contractual relations up to the time for performance, as well as to a performance of the contract when due. If it appear that the party who makes an absolute refusal intends thereby to put an end to the contract so far as performance is concerned, and that the other party must accept this position, why should there not be speedy action and settlement in regard to the rights of the parties."

In Dingley vs. Oler, 117 U. S. 490, referring to the communication there, the Court says:

"It was not intended, we think, as a final and absolute declaration that the contract must be regarded as altogether off, so far as their performance was concerned, and it was not so treated by the plaintiffs."

Again in the same case:

"This, we think is very far from being a positive, unconditional and unequivocal declaration of fixed purpose not to perform the contract in any event or at any time. In view of the consequences sought to be deduced and claimed as a matter of law to follow, the defendants have a right to claim that their expressions, sought to be converted into a renunciation of the contract, shall not be enlarged by construction beyond their strict meaning."

Again, in M'Bath vs. Jones Cotton Co., 149 Fed. 383, it is said:

"To justify a cancellation of a contract for purchase of so many bales of cotton of a certain type or quality before the time for delivery by the seller has passed, upon the ground of a tender of cotton not receivable, the purpose of the seller to make no other tender and to stand irrevocably upon the tender of delivery made must be absolute and unmistakable. There must be no *locus penitentiae.*" [361]

In 13 Corpus Juris, 654, which is supported by the citation of numerous authorities, it is said:

"In order that the rule may apply, the renunciation must cover the entire performance to which the contract binds the promisor.

> "MUST BE DISTINCT AND UNEQUIVOCAL. The renunciation must be absolute and unequivocal; a mere expression of intention not to perform is not enough, but no precise form of words is necessary. The obligation of the contract being created, a denial of its existence is equivalent to a repudiation or renunciation of liability under it."

In Marks vs. Van Eighen, a case which I cited to another point, the Court said:

> "The action cannot be maintained when the evidence to prove a renunciation of the contract is equivocal or indeterminate."

Now, even though there had been or was an anticipatory breach, the question then arises, was libelant able to perform the contract of February 25th according to its terms? Counsel makes a very ingenious, and, indeed, a very interesting argument on the question. What does that contract mean? The clause of the contract with which we are concerned, opposite the word "shipment," reads, "Per American steamship 'Cacicue' June loading."

He lays some stress upon the fact that there is no comma in the original contract between the word "Cacicue" and the word "June," and I really do not think that that makes any difference. However, his contention is that what was meant by this contract was that the shipment was to be made on the "Cacicue" when she returned from her voyage to the Orient. Now, how [362] easy it would have been to say that. How easy it would have been to say that as soon as the "Cacicue" got back from

her Oriental voyage the loading should take place.

Now, suppose you had those two things side by side, on the one hand you had the words "Shipment per American steamship 'Cacicue' June loading," and on the other side you had opposite the word "shipment," "the loading to begin as soon as the steamer returns from its Oriental voyage," would anybody contend that they meant the same thing? Yet, isn't that the contention of counsel on the other side now?

The words "June loading" have not any hidden meaning. They are perfectly plain. Anybody would understand what those words meant. I take it that no one would question for a moment that used in another contract they meant that the loading should take place in June and that the entire loading should take place in June.

Mr. HENGSTLER.—Are you sure about that in law, Mr. McCutchen?

Mr. McCUTCHEN.—You may have some law on the subject, of which I am not advised, but I would not think there would be any question about that. That would seem to me to be perfectly plain. But counsel says these parties were not contracting with reference to a June loading. The telegram of the 23d, or, I think it was the 22d—and I might say in passing that Mr. Davis acted upon telegrams and letters, and says that he showed those telegrams and letters to Grace & Co., which would have been a very natural thing for him to do, because Mr. Moore wanted to know whether he had authority—he was not in the office of the Ford Motor Company of

Canada, Ltd., and, naturally, Grace & Co. knew that his authority was special [363] and limited, and that he could not do anything beyond what he was authorized to do. What did the respondent want? After referring to certain shipments that were to go forward or had gone forward—no, they were to go forward in April and May—they said to Mr. Davis, or to the Ford Motor Company of San Francisco, "Would like another 4000 tons of May and June sailing offer $47.50." Now, is it possible to argue in the face of that that they were not concerned with the time when this freight should go forward? What did Mr. Davis reply? In his reply of the 24th of February he said, "Can get 6200 tons by steamship 'Cacicue' for early June." Early June, why? Clearly, early June sailing. That is what the Ford Motor Company of Canada wanted.

After it had been advised by telegram that space had been reserved, still treating the date of sailing as important, they said, "Let us know the dates on which the shipments are to sail," and to that Mr. Davis replied "About the 24th of June."

Now, under those circumstances this contract was drawn; it was drawn by Grace & Co. without any consultation as to the language to be employed with Mr. Davis or anybody representing the respondent. It was the language of Grace & Co. from beginning to end.

Now, unless there is some ambiguity in this contract with reference to the words "June loading," those words are to be accepted and interpreted according to their ordinary meaning. I submit that

there is not anything in this record showing that these words "June loading" do not mean what those words ordinarily would mean. Mr. Carter testified in answer to a question put to him by your Honor, "What are those words understood to mean [364] among shipping men," that the words meant that the loading was to begin in June.

He was asked later as to whether he wished to be understood as saying that that meant that the loading could begin on the last minute of the last day of June, and he said that was a point that was very much discussed among shipping men; by the most liberal rule of interpretation that could be applied to Mr. Carter's testimony, it does not appear that that expression or those words have been interpreted by the shipping community to mean that the loading may begin on the last day of June. Now, what was it that was debated, that had long been the subject of debate among shipping men; whether that loading could begin on the last day of June, and whether a loading which began on the last day of June would save the rights of the carrier under the contract. Now, in order that those words can have any different meaning as the result of some custom, that custom must have been generally understood and recognized, and there is no showing here that the custom was either so understood or recognized.

In Clarke vs. Blue Licks Springs Co., 184 Ky. 827, but I read from 5 A. L. R. 234, that case was a proceeding to recover a balance alleged to be due under a contract to drill a well. Part of the controversy arose over the true meaning of the word "reaming,"

as found in the contract. Webster's definition of the word was—"to widen the opening of a hole; to enlarge or dress out a hole with a reamer."

The plaintiff, while admitting that that was the proper definition of the word, contended that a custom prevailed among well drillers which enlarged the meaning of the word, so as to include within the term all of the depths of the larger hole made after passing [365] the bottom of the smaller one being reamed. For illustration: If a 5-inch hole extends the depth of one hundred feet, and it is desired to ream it so as to make an 8-inch hole, and the latter dimensions are continued after passing the bottom of the 5-inch hole, the entire distance of the 8-inch hole is properly considered as reaming.

The Court said:

> "In the first place, it is perfectly plain that the alleged customary definition is directly contrary to the meaning of the word as given by Mr. Webster, and for it to prevail, and be allowed to affect the contract and the rights of the parties, it must be shown that the alleged custom through and by which it is done must either have been known and understood by the parties at the time of entering into the contract, and that the contract was made with reference to it, or the custom must have been of such universal use as that it would be presumed to have been known by the parties. . . .
>
> "No such customary meaning of the word is shown to have existed in that community. It is true that plaintiff testified to the existence of

such a custom among well drillers, and introduced a witness who testified as to the custom prevailing among drillers of oil wells in communities far removed from the vicinity where the well involved here was being drilled; but neither of them attempted to say that any such custom prevailed in that vicinity. Besides, a number of witnesses, some of whom were well drillers in the immediate vicinity, testified to the contrary, and further said that the only 'reaming,' as used in the contract, meant only the enlargement of a smaller hole to its bottom, and that the reaming ceased when the bottom of the small hole was reached, although the larger hole was [366] *reached, although the larger hole was* continued on below that point.''

In The Gualala, 178 Fed. 402, the Circuit Court of Appeals of this circuit quoted approvingly from the decision of the Supreme Court of the United States, as follows:

> "A usage, to be binding, should be definite, uniform and well known. It should be established by clear and satisfactory evidence so that it may be justly presumed that the parties had reference to it in making their contract."

The COURT.—I dislike to interrupt you, Mr. McCutchen, but you have had your hour and a quarter.

Mr. McCUTCHEN.—Very well, your Honor. Will your Honor let me cite the case—

The COURT.—You may file a memorandum of

any authorities you wish to, in addition to your oral argument.

Mr. McCUTCHEN.—Very well. I wanted to read your Honor one case on the subject of sending a vessel to drydock with cargo on board.

Mr. HENGSTLER.—Is that the "Indrapura" case?

Mr. McCUTCHEN.—Yes.

Mr. HENGSTLER.—You know there are two phases to that case. I suppose your Honor is familiar with it.

The COURT.—I am quite familiar with the name, and probably can find it. Give me the citation and I will look it up.

Mr. McCUTCHEN.—The one that I have here is 171 Federal, 929.

Mr. HENGSTLER.—That came up in another phase later on, your Honor.

The COURT.—Doctor, you have reserved a portion of your time, and I will hear from you now if you have anything further [367] to say.

## CLOSING ARGUMENT OF L. T. HENGSTLER, ESQ.

Mr. HENGSTLER.—If your Honor please, I will confine myself to this question of waiver of the breach. I have the authorities on our side noted in the memorandum which I handed to your Honor, which show that in this case there was no waiver of the breach. The particular case I desire your Honor to consider in this connection is the case of Tri-Bullion Smelting and Development Co. vs. Jacobsen, Circuit Court of Appeals, Second Circuit,

233 Federal, 646. That was an action to recover damages for breach of contract to sell the output of zinc concentrates during a term of two years. After a year and a half the defendant refused to make deliveries, claiming that it was released, and on July 7, 1913, so notified the plaintiff. On July 8th, Jacobsen, the plaintiff, wrote the defendant stating that if it did not immediately resume shipment he would purchase the goods in the open market and hold the defendants for the difference in prices. I quote from the opinion:

> "The theory of Tri-Bullion seems to be that because, in the letter of July 8th, Jacobsen urged Tri-Bullion to proceed to fulfill the contract, he was thereby precluded from bringing action for an anticipatory breach but must perform all of the provisions of the contract called for on his part, one of which was to pay the amount thereafter due for ore theretofore delivered and that Jacobson could sue only for failure to deliver any installment as the installment became due month by month.
>
> "(1) The question of fact in the trial court was whether Tri-Bullion had breached its contract. Both parties having moved for the direction of a verdict, and the court having directed a verdict in favor of plaintiff, that question is disposed [368] of by the verdict, and what the verdict amounts to is a finding that Tri-Bullion broke its contract, and it matters not whether the breach was actual or anticipatory. Wilson vs. Knowles, 213 Fed. 782,

130 C. C. A. 440; Reis vs. Rosenfeld, 204 Fed. 282, 122 C. C. A. 480; United States vs. Two Baskets, 205 Fed. 37, 123 C. C. A. 310; Allegheny Valley Brick Co. vs. C. W. Raymond Co., 219 Fed. 477, 135 C. C. A. 189.

"(2) Viewed, however, as an anticipatory breach, the action of Jacobsen in writing the letter of July 8, 1913, insisting that Tri-Bullion should carry out his contract, did not, in any manner, cure such anticipatory breach by Tri-Bullion. The persistent position of Tri-Bullion was that it was excused by the force majeurs clause—an obvious pretense to avoid the obligations of a contract which had become unprofitable. Jacobsen's letter of July 8th, as the District Judge said, 'was an ordinary business letter in which the plaintiff said in substance: 'You ought to perform your contract, and I request you to do so; but, if you do not, I will enter the market, buy zinc concentrates, and hold you for the difference between the cost to me and the contract price.' "

"Where a party to a contract insists that he is not under legal obligation to perform the contract, and that insistence is coupled with a continuance of his original stand and refusal to perform, the breach is plain, and he cannot successfully take refuge in the plea that he must be excused because the other party urges that the contract be carried out, failing which such other party states he will be compelled to purchase goods in a rising market."

There are cited as authorities to this last holding of the Court the cases which Mr. McCutchen has cited to your Honor on the [369] other side, Roehm vs. Horst, 178 U. S. 1; and particularly Marks vs. Van Eeghen, 85 Fed. 853.

There is little confusion about this matter of waiver of an anticipatory breach; if one party to a contract has breached that contract, the contract is not dead; the other party can still say, "I want my remedies for your breach of the contract"; and claiming to insist upon remedies for the breach of the contract, such as demurrage and other remedies, is not a waiver of the contract.

Under the principles announced in the authorities cited, including the Tri-Bullion case, it is clear that in the case at bar there was no waiver by W. R. Grace & Co. of its claim that the contract had been breached by the respondent.

On June 24, 1916, the respondent repudiated the contract. On June 26, 1916, the libelant sent a telegram to the respondent in which it stated: "We do not in any way release or waive any claim for damages or demurrage due to your breach of contract." This language refutes any claim that libelant waived or intended to waive the respondent's breach by writing that letter.

On June 27, 1916, the libelant commenced this action, alleging breach of the contract. What stronger evidence to negative any intent of waiver could be produced than the fact of the commencement of this action by libelant?

The case of Marks vs. Can Eeghen, cited by the other side, from the Circuit Court of Appeals of the Second Circuit, contains the following:

> "In the present case there was sufficient evidence of an unequivocal renunciation of the contract by the defendant, and the election of the plaintiffs to treat the contract as terminated was signified by the prompt commencement of the action."

On June 28, 1916, libelant notified respondent by telegraph [370] that the vessel was ready to load on June 27th, and that demurrage commenced to run by reason of the failure of respondent to deliver the cargo alongside as fast as the vessel could be loaded. There was nothing in this telegram which would make a stronger case of waiver than was there in the letter written by Jacobsen in the Tri-Bullion Smelting & Development case, wherein he said:

> "You ought to perform your contract, and I request you to do so; but if you do not, I will enter the market, buy zinc concentrates and hold you for the difference between the cost to me and the contract price."

The Circuit Court of Appeals held that that letter did not in any manner cure such anticipatory breach by the Tri-Bullion.

It should also be kept in mind that the telegram of June 28th was sent after the libelant had filed its libel declaring on the breach of contract, and seeking to recover damages for the same, and that the

rights of the parties had then become fixed for the purposes of this action.

Much has been said by the other side about exact dates pleaded in the libel, and that we are tied down to June 22, or June 24, or June 26, because the libel says so—

The COURT.—I suppose everybody will agree that the breach must have preceded the filing of the libel.

Mr. HENGSTLER.—Yes, your Honor, that the breach must have preceded the filing of the libel. I claim that the breach preceded the filing of the libel, and that the breach continued right down even to the moment when the libel was filed. We are not tied down even to this anticipatory breach; that it appears from the evidence that at the time the libel was filed—

The COURT.—No after breach would support this libel, [371] would it?

Mr. HENGSTLER.—No. I will rest on the breaches down to the time of the filing of the libel.

Now, this question of variance is a very important question at common law, but I want to call your Honor's attention particularly to the fact that all these reliances upon exact dates when this anticipatory breach happened do not count for anything in admiralty.

In Dupont vs. Vance, 19 Howard, 173, which is a leading case on this subject, libelant sought to recover damages for failure to deliver a shipment of goods. The proof showed jettison caused by peril of the sea, and the Court allowed recovery of a gen-

eral average contribution. In discussing the question of whether the pleadings were in such form as to present the claim for contribution, the Court held:

> "The rules of pleading in the admiralty are exceedingly simple and free from technical requirements. It is incumbent on the libelant to propound with distinctness the substantive facts on which he relies; to pray, either specially or generally, for the relief appropriate to them; and to ask for such process of the Court as is suited to the action, whether *in rem* or *in personam*.
>
> "It is incumbent on the respondent to answer distinctly each substantive fact alleged in the libel, either admitting or denying, or declaring his ignorance thereof, and to allege such other facts as he relies upon as a defense, either in part or in whole, to the case made by the libel.
>
> "The proofs of each party must correspond substantially with his allegations, so as to prevent surprise. But there are no technical rules of variance, or departure in pleading, like [372] those in the common law, nor is the court precluded from granting the relief appropriate to the case appearing on the record, and prayed for by the libel, because that entire case is not distinctly stated in the libel."

And no one could claim that anyone could be surprised here, because whatever was done with reference to breaches, or anticipatory breaches, was done by the other side; they knew better than we possi-

bly could know. We only have found out many of the facts by this correspondence which was produced here in court at the trial.

In The Gazelle and Cargo, 128 U. S. 474, upon appeal to the Supreme Court it was held:

> "The charterers, having detained the vessel by their persistent refusal to order her to such a port as was described in the charter-party, the master, as he had a right to do, treating the charter-party as still existing, filed successive libels, claiming demurrage accruing under it, until the charterers filed a cross-libel, contending that the master (who had only maintained the just rights of the owners) had committed a breach of the charter-party.
>
> "It is further contended that the Court erred in awarding as damages the whole freight, amounting to $3,285.60, under libels claiming only demurrage and expenses to the amount of $2,470.20. But those libels set forth all the material facts ultimately found by the Court, and each libel contained a prayer for general relief.
>
> "In the Courts of Admiralty of the United States, although the proofs of each party must substantially correspond to his allegations, so far as to prevent surprise, yet there are no technical rules of variance, or of departure in pleading, as [373] at common law; and if a libelant propounds with distinctness the substantive facts upon which he relies, and prays, either specially or generally, for appropriate

relief (even if there is some inaccuracy in his statement of subordinate facts, or of the legal effect of the facts propounded), the Court may award any relief which the law applicable to the case warrants."

The above case was quoted and followed in Davis vs. Adams, Circuit Court of Appeals of this Circuit, 102 Federal, 520, in which the Court, on appeal, allowed the libelant to amend his libel substituting a claim for wages for one of damages sustained for forced detention, the Court holding:

"The Court below, in its opinion, states, in effect, that the appellant has a meritorious case upon the facts proven, but denies his right to recover because of the character of his pleading. This is a technical defect merely, and under the authorities above cited the Court should not allow mere technicalities to overthrow the principles of equity, and defeat the ends of justice."

These cases are binding upon this court with reference to that question.

As far as the principles of equity and the ends of justice are concerned, if your Honor please, it seems to me that in this case, which rests upon the language "'Cacicue' June loading," and in the light of the construction which the parties, themselves, and particularly the other side, gave to it, and in view of the fact that they not only did not insist upon the loading being in June, but hailed with delight as a life saver that probably the loading would not be in July, it would be but just to construe these

words by giving them the meaning, "'Cacicue's' June loading"—"Cacicue" with an apost*h*rophe "s"— [374] rather than the meaning, "'Cacicue' warranted June loading," a meaning these people never thought of until June, when they could not possibly carry out their contract and had to find some means of getting out of it.

The COURT.—The matter will be submitted.

Mr. McCUTCHEN.—Within what time, your Honor, shall we hand you our memorandum?

The COURT.—As early as you can.

[Endorsed]: Filed Nov. 27, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [375]

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In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

W. R. GRACE & CO., a Corporation,

Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD. a Corporation, et al.,

Respondents.

**(Opinion and Order Dismissing Libel.)**

ANDROS & HENGSTLER and GOLDEN W BELL, Esq., Proctors for Libelant.

McCUTCHEN, WILLARD, MANNON & GREENE and W. F. WILLIAMSON, Esq. Proctors for Respondent.

This is an action *in rem* and *in personam* for breach of contract to furnish cargo for one of libelant's vessels.

On February 25th, 1916, libelant and respondent entered into the following written contract:

"San Francisco, February 25th, 1916.

"Ford Motor Company,

"San Francisco, Cal.

"Gentlemen:

"Attention Mr. L. C. Davis.

"We confirm freighting engagement as follows:

"COMMODITY: 6200 tons (40 cubic feet each) automobiles and parts, in packages.

"RATE: $47.50 per 40 cubic feet measurement from San Francisco to Wellington, New Zealand, and/or Sydney, Australia, freight prepaid; quantity for each port to be declared within ten days from date. [376]

"SHIPMENT: Per American S. S. 'Cacique' June loading; when vessel is closer at hand, will advise you more definitely as to exact loading date.

"DELIVERY: To be delivered alongside steamer at San Francisco as fast as vessel can load, otherwise shippers to pay demurrage at rate of $3,000.00 per day.

"Total shipment weighs approximately 1550 tons (2240 pounds each) measuring about four to one.

"Yours very truly,

"W. R. GRACE & CO.

"(Sgd.) H. E. MOORE,

"Traffic Manager.

"Accepted:

"(Sgd.) FORD MOTOR CO. OF CANADA, LTD.

"By L. C. DAVIS."

As the Court construes this contract, it fixed June as the time at which the "Cacique" should load the cargo of 6200 tons agreed to be furnished by respondent. Libelant was at all times willing and eager to carry out the contract, while respondent was not willing to furnish more than 4075 tons of the 6200 tons contracted for, and on June 14th advised libelant that "4075 tons is the entire cargo that we will furnish for this vessel. If you wish to accept this cargo, you are at liberty to do so on these terms. If you take the attitude that there is a contract binding on this Company for 6200 tons space, and attempt to hold this 4075 tons cargo for Freight for 6200 tons at the above rate, we will decline to load any of the cargo whatever."

To this notification libelant replied: "We now have to advise you that we stand strictly upon the contract made with you, and insist upon your fulfillment of the same in every particular. We are, and always have been ready to perform all of our obligations under said contract. We further advise you that we will take such quantity of automobiles as are delivered to us, and hold you responsible [377] for all damages, including demurrage, which we may ultimately sustain by reason of any breach of said contract. By taking a smaller quantity of automobiles than the quantity which you contracted to deliver, we do not accept such smaller quantity as a

full satisfaction of the contract, but only as a partial satisfaction which it in fact is."

On June 22d libelant informed respondent that delivery of freight was to begin on June 27th and be completed by June 29th. On June 27th, however, the "Cacique" as not ready to take on cargo, and could not have been made ready to do so. The contract did not permit libelant arbitrarily to fix a date for the delivery of freight, but required only that freight "be delivered alongside the steamer at San Francisco as fast as vessel can load."

This action was commenced on June 27th, at which time there had been no actual breach of the contract on the part of respondent for the reasons: 1. that the vessel was not at that time in condition to load; and, 2. there were 1100 pieces of respondent's freight on the wharf which libelant treated as having been delivered in part fulfillment of the contract, and notwithstanding the notice that delivery of freight should begin on June 27th, and be completed by June 29th, respondent was required by the contract to deliver only as fast as the vessel could load. As there was, therefore, no actual breach of the contract before the filing of the libel, which indeed was filed before performance was due, the action, if maintainable at all, can only be maintained upon the theory that there was an anticipatory breach committed by respondent when it notified libelant that it would furnish only 4075 tons of freight, and insisted that the amount so furnished should not be held by libelant for the 6200 tons contracted for. There is, of course, [378] no doubt that an action

may be maintained for a breach of contract upon a distinct notification by one of the parties that he will not perform an executory contract such as this, even though performance be not due at the time of such notification, the notification being regarded as an anticipatory breach, but the party aggrieved by such anticipatory breach may not thereafter accept a part performance under the contract, and still maintain his action upon such anticipatory breach, and before performance is due. In the instant case, by filing its libel *in rem* against the 1100 pieces of freight on the pier libelant, despite its present protests, elected to accept such 1100 pieces as part performance of the original contract. It could have no action *in rem* against them unless delivered and received as freight under the contract. As bearing upon this proposition the testimony of Mr. Carter, libelant's manager, who had charge of the transaction is of interest.

"Q. So that you knew at that time that the Ford Motor Company had actually delivered 1100 packages, or thereabouts, of the freight which you in this telegram of the 26th of June demanded it should deliver? A. Yes, but also knew it was delivered by mistake. Q. That is, it was not intended as freight for the steamer? A. No, it was not the intention of the Ford Motor Co. to give us that freight. Q. And it was not received by you as freight? A. It was received as freight. Q. It was received as freight? A. It was received as freight. Q. Then you had it as freight? A. We did. Q. And you thereafter, as set forth in this libel verified by you, proceeded to

foreclose a maritime lien upon the 1100 packages of freight. A. Yes. The railroad at that time was requesting us either, as I remember it, to return or permit them to take away that cargo; they claimed they had made an error in delivering it [379] to us; we naturally, when we placed our libel, libeled everything we could find of Ford. * * * Q. You did not comply with any request of the Southern Pacific Company on that subject, if any such was made to you? A. No, we did not. Q. But you proceeded two days after that to foreclose a maritime lien upon those packages, didn't you? A. Yes."

While it is true that respondent endeavored to have this freight retaken into possession by the Railroad Company that had delivered it, yet this fact is not very material in view of the action of libelant as disclosed by the above testimony and by the course pursued by it in proceeding against the packages *in rem* as against freight in its possession as such. We have then an action for breach of contract commenced before performance was due, based upon a claimed repudiation of the contract, but which repudiation was not accepted by libelant as such, because it held 1100 packages as freight delivered in pursuance to the contract after such repudiation, and proceeded to foreclose a maritime lien against it as such in the very action based upon such repudiation. But if we regard the letters and conduct of respondent as a repudiation of the contract, libelant could only maintain an action thereon by accepting them as such. It could not for one purpose hold the contract as broken, and for another regard it as in

process of being performed. It could not before performance was due maintain an action as for an anticipatory breach of the contract, and in the action itself proceed *in rem* against freight that could not be held as such unless delivered under and in part performance of the same contract. It is true that in the Admiralty an action will sometimes be sustained even though prematurely brought, where there is some good reason for doing so. But where as here performance was not due at the time the action was commenced, where performance of at least a substantial portion of the contract was offered by [380] respondent, and where there is a very grave question as to whether libelant itself was or would be in a position to carry out its portion of the contract, however willing to do so, I do not think that justice requires, or indeed will permit the maintenance of the action upon an anticipatory breach, unless when the libel was filed such breach would sustain it. During the argument of the case the following colloquy occurred between the Court and libelant's counsel:

"The COURT.—I suppose everybody will agree that the breach must have preceded the filing of the libel?

"COUNSEL.—Yes, your Honor, that the breach must have preceded the filing of the libel. I claim that the breach preceded the filing of the libel, and that the breach continued right down to the moment when the libel was filed. We are not tied down even to this anticipatory breach; that it appears from the evidence that at the time the libel was filed—

"The COURT.—No after breach would support this libel would it?

"COUNSEL.—No. I will rest on the breaches down to the time of the filing of the libel."

At the time the libel was filed the breach relied upon could not support an action for the reasons hereinbefore stated. At that time the libelant had suffered no injury and respondent was still entitled to perform its agreement. Whatever rights may have later accrued to libelant, or whatever injury, if any, it may have later suffered, when this action was commenced it was still uninjured, and for this reason the present libel must be dismissed.

March 1st, 1921.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Mar. 1, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [381]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

W. R. GRACE & CO., a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and ROBERT NETTLEFOLD,

Claimants.

**Final Decree Dismissing Libel.**

This cause having come on duly to be heard and having been heard on the 15th, 16th, 17th and 22d days of November, 1920, in the above-entitled court, the libelant appearing by its proctor Louis T. Hengstler, Esq., and respondent and claimants appearing by their proctors, W. F. Williamson, Esq., Edward J. McCutchen, Esq., and Farnham P. Griffiths, Esq., and testimony oral and documentary having been taken and the cause having been heard on the pleadings and proofs and having been argued and submitted by the proctors for the respective parties, all in open court on the said days, and due deliberation having been had in the premises, and the Court having filed its opinion herein with findings as therein stated and ordering that the libel must be dismissed:

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the said libelant take nothing by its said libel and that the libel [382] be dismissed and that respondent and claimant Ford Motor Company of Canada, Ltd., and claimant, Robert Nettlefold, do have and recover from libelant their costs to be taxed, with interest on said costs at the rate of six (6) per cent per annum.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that if this final decree and judgment for costs as above shall remain unsatisfied for

ten days after the entry hereof and notice to the proctor for libelant, then unless an appeal be taken from this decree within the time limited by law and by the rules and practice of this court, the sureties or stipulators for costs on the part of libelant do cause the engagement of their stipulation for costs to be performed, or show cause within four days why execution should not issue against them, their lands, goods and chattels, according to their stipulation, to enforce satisfaction of this decree.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that unless an appeal be taken from this decree within the time limited by law and the rules and practice of this Court, the claimants' stipulation for costs and for the release of the property herein seized under process *in rem* and under the writ of foreign attachment heretofore issued herein, be cancelled and the stipulators thereon exonerated and discharged.

Dated: April 11, 1921.

M. T. DOOLING,
District Judge.

Signed at San Francisco, May 3d, 1921.

M. T. DOOLING,
Judge.

[Endorsed]: Entered in Vol. 10 Judg. and Decrees, at page 420.

Filed Apr. 13, 1921. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

Filed May 4, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [383]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

W. R. GRACE & CO., a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,
Respondents.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and ROBERT NETTLEFOLD,
Claimants.

**Notice of Appeal.**

To Ford Motor Company of Canada, Ltd., a Corporation, Respondent and Claimant, Robert Nettlefold, Claimant, and to W. F. Williamson, Esq., Messrs. McCutchen, Olney & Willard, Ira A. Campbell, Esq., Messrs. Pillsbury, Madison & Sutro, Farnham P. Griffiths, Esq., and Messrs. McCutchen, Willard, Mannon & Greene, Their Proctors; and to the Clerk of the District Court of the United States for the Northern District of California:

You and each of you will please take notice that the libelant above named hereby appeals to the United States Circuit Court of Appeals for the

Ninth Circuit, from the final decree of the District Court of the United States for the Northern District of California, filed and entered herein on the 4th day of May, 1921.

Dated: San Francisco, California, May 26, 1921.

ANDROS & HENGSTLER,
Proctors for Libelant. [384]

[Endorsed]: Receipt of a copy of the within notice of appeal is hereby admitted this 26th day of May, 1921.

W. F. WILLIAMSON,
PILLSBURY, MADISON & SUTRO,
McCUTCHEN, WILLARD, MANNON & GREENE,
Proctors for Claimants and Respondents.

Filed May 26, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [385]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

W. R. GRACE & CO.,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,
Respondents.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and ROBERT NETTLEFOLD,

Claimants.

**Assignment of Errors.**

Libelant above named assigns errors in the proceedings and decree of the District Court as follows:

I.

The District Court erred in its construction of the contract of February 25th, 1916, between respondent Ford Motor Company of Canada, Ltd., and libelant.

II.

The District Court erred in construing said contract as meaning that it fixed June as the time at which the "Cacicue" should load the cargo of 6200 tons agreed to be furnished by respondent.

III.

The District Court erred in finding that, on June 27th, 1916, there were 1100 pieces of respondent's freight on the wharf which libelant treated as having been delivered in part fulfillment of the contract. [386]

IV.

The District Court erred in finding that the pieces of respondent's freight on the wharf were treated by libelant as having been delivered in part fulfillment of the contract.

V.

The District Court erred in finding and deciding that, by filing its libel *in rem* against the 1100 pieces of freight on the pier libelant elected to accept such

1100 pieces as part performance of the original contract.

VI.

The District Court erred in deciding that libelant could have no action *in rem* against the 1100 pieces of freight on the pier unless delivered and received as freight under the contract.

VII.

The District Court erred in deciding that the fact that respondent endeavored to have the 1100 pieces of freight retaken into possession by the Railroad Company was not very material.

VIII.

The District Court erred in finding that libelant proceeded against the packages *in rem* as against freight in its possession as such.

IX.

The District Court erred in finding and deciding that respondent's repudiation was not accepted by libelant as such.

X.

The District Court erred in finding that libelant held 1100 packages as freight delivered in pursuance to the contract after such repudiation.

XI.

The District Court erred in finding and deciding that libelant proceeded to foreclose a maritime lien against 1100 packages as [387] freight delivered in pursuance to the contract after repudiation.

XII.

The District Court erred in finding and deciding that libelant proceeded *in rem* against freight de-

livered under and in part performance of the contract.

XIII.

The District Court erred in deciding that performance was not due at the time the action was commenced.

XIV.

The District Court erred in finding that there was a very grave question as to whether libelant was or would be in a position to carry out its portion of the agreement.

XV.

The District Court erred in deciding that there was no actual breach of the contract on the part of respondent on June 27th.

XVI.

The District Court erred in not holding and deciding that, when the libel was filed, an anticipatory breach would sustain the action.

XVII.

The District Court erred in not deciding that justice required the maintenance of the action upon an anticipatory breach.

XVIII.

The District Court erred in deciding that, at the time the libel was filed, the breach relied upon could not support an action.

XIX.

The District Court erred in not deciding that, at the time the libel was filed, the breach did support an action.

XX.

The District Court erred in deciding that, at the time the libel was filed, the libelant had suffered no injury. [388]

XXI.

The District Court erred in not deciding that the action should be sustained upon rights which accrued to the libelant after the filing of the libel.

XXII.

The District Court erred in not deciding that the action should be sustained upon injuries which libelant suffered after the filing of the libel.

XXIII.

The District Court erred in ordering the libel to be dismissed.

XXIV.

The District Court erred in decreeing that the libelant take nothing by its libel.

XXV.

The District Court erred in decreeing that respondent and claimant Ford Motor Company of Canada, Ltd., and claimant Robert Nettlefold, do have and recover from libelant their costs to be taxed, or any costs.

XXVI.

The District Court erred in not ordering and entering a decree in favor of libelant, in accordance with the libel on file herein.

ANDROS & HENGSTLER,
Proctors for Libelant.

[Endorsed]: Receipt of a copy of the within assignment of errors is hereby admitted this 26th day of May, 1921.

W. F. WILLIAMSON,
PILLSBURY, MADISON & SUTRO,
McCUTCHEN, WILLARD, MANNON & GREENE,
Proctors for Claimants and Respondents.

Filed May 26, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [389]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,058.

W. R. GRACE & CO., a Corporation,
Libelant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,
Respondents.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and ROBERT NETTLEFOLD,
Claimants.

**Stipulation (and Order Regarding Certain Original Exhibits).**

IT IS HEREBY STIPULATED that in making

up the apostles on appeal of the above-entitled action to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, the original exhibit attached to the return of the Southern Pacific Company to the citation and order for foreign attachment and the original exhibit attached to the answers of the libelant to respondents' interrogatories herein may be filed in said United States Circuit Court of Appeals, and that copies of said exhibits need not be included in the apostles on appeal.

Dated: June 23d, 1921.

ANDROS & HENGSTLER,
Proctors for Libelant.

W. F. WILLIAMSON,
FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,
Proctors for Claimants and Respondents.

It is so ordered.

WM. W. MORROW,
Circuit Judge. [390]

[Endorsed]: Receipt of a copy of the within stipulation is hereby admitted this 23d day of June, 1921.

W. F. WILLIAMSON,
FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,
Proctors for Claimants and Respondents.

Filed Jul. 14, 1921. W. B. Maling, Clerk. By

**Certificate of Clerk U. S. District Court to Apostles on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing 391 pages, numbered from 1 to 391, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the cause entitled W. R. Grace & Co., a Corp., Libelant, vs. Ford Motor Company of Canada. Ltd., a Corp., et al., Respondents, No. 16,058, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for apostles on appeal (copy of which is embodied herein), and the instructions of the proctors for libelant and appellant herein.

I further certify that the cost for preparing and certifying the foregoing apostles on appeal is the sum of One Hundred Fifty-four Dollars and Fifteen Cents ($154.15), and that the same has been paid to me by the proctors for libelant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 21st day of July, A. D. 1921.

[Seal] WALTER B. MALING.
Clerk.
By C. M. Taylor,
Deputy Clerk. [392]

[Endorsed]: No. 3721. United States Circuit Court of Appeals for the Ninth Circuit. W. R. Grace & Company, a Corporation, Appellant, vs. Ford Motor Company of Canada, Ltd., a Corporation, and Robert Nettlefold, Appellees. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed July 22, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

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In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3721.

W. R. GRACE & CO., a Corporation,
Appellant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and ROBERT NETTLEFOLD,
Appellees.

**Notice of Filing Apostles on Appeal.**

To the Appellees Above Named, and to W. F. Williamson, Esq., Messrs. McCutchen, Olney, Willard, Mannon & Greene, Farnham P. Griffiths, Esq., and Messrs. Pillsbury, Madison & Sutro, Their Proctors:

You and each of you will please take notice that the apostles on appeal of the above-entitled action from the District Court of the United States for the Northern District of California to the above-entitled court were filed with the clerk of the said Circuit Court of Appeals on the 22d day of July, 1921.

Dated: July 25th, 1921.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
F. W. DORR,
Proctors for Appellant.

Receipt of a copy of the within notice of filing apostles on appeal is hereby admitted this 25th day of July, 1921.

W. F. WILLIAMSON,
FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,
PILLSBURY, MADISON & SUTRO,
Proctors for Appellees.

[Endorsed]: No. 3721. In the United States Circuit Court of Appeals, for the Ninth Circuit. W. R. Grace & Co., a Corporation, Appellant, vs. Ford Motor Company of Canada, Ltd., a Corporation, and Robert Nettlefold, Appellees. Notice of Filing Apostles on Appeal. Filed Jul. 25, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 16,058 (District Court).

W. R. GRACE & CO., a Corporation,
Appellant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and CERTAIN AUTOMOBILES AND PARTS IN PACKAGES,

FORD MOTOR COMPANY OF CANADA, LTD., a Corporation, and ROBERT NETTLEFOLD,
Appellees.

**Stipulation and Order Extending Time to and Including July 25, 1921, to File Record and Docket Cause.**

IT IS HEREBY STIPULATED that the appellant above named may have to and including the 25th day of July, 1921, within which to file the record and docket the above-entitled action on appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: June 23d, 1921.

W. F. WILLIAMSON,
McCUTCHEN, WILLARD, MANNON & GREENE,
Attorneys for Appellees.

It is so ordered.

WM. W. MORROW,
Judge of the United States Circuit Court of Ap-

[Endorsed]: No. 3721. In the United States Circuit Court of Appeals for the Ninth Circuit. W. R. Grace & Co., a Corporation, Appellant, vs. Ford Motor Company of Canada, a Corporation, etc., Ford Motor Company of Canada, Ltd., a Corporation, and Robert Nettlefold, Appellees, Stipulation and Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including July 25, 1921, to File Record and Docket Cause. Filed Jun. 24, 1921. F. D. Monckton, Clerk. Refiled Jul. 22, 1921. F. D. Monckton, Clerk.